

87-1629

Supreme Court, U.S.
FILED

MAR 31 1988

JOSEPH F. SPANIOLO, JR.
CLERK

No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Washington

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Last term, this Court held that the very same Washington state taxes involved here violated the Commerce Clause of the United States Constitution. On remand, the state's highest court refused to order refunds of those taxes, holding that this Court's decision would be applied only prospectively, even as to the parties before the Court whose rights had been adjudicated. The questions presented are:

1. Whether a state court renders this Court's decision merely advisory, in violation of Article III and the Supremacy Clause, by treating the very taxes this Court invalidated "as if . . . constitutionally collected."
2. Whether the Commerce Clause is frustrated by a state court's refusal, on remand, to apply this Court's decision to the very taxes invalidated in the decision, based on a unique "reshaping" of nonretroactivity requirements that would permit states to keep the fruits of their discrimination in virtually every case.

PARTIES TO THE PROCEEDING

Appellants before the Washington Supreme Court and this Court are business enterprises listed at App. D. The list of parents, subsidiaries, and affiliates of these enterprises required by Rule 28.1 appears at App. E.

Appellee before the Washington Supreme Court and this Court is the State of Washington, through its administrative agency, the Department of Revenue.

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On Appeal from the Supreme Court of Washington

JURISDICTIONAL STATEMENT

Appellants respectfully pray that this Court note probable jurisdiction to decide this appeal from the final decision of the Washington Supreme Court rendered January 28, 1988, sustaining on remand the same Washington tax statutes, applied to Appellant Taxpayers over their constitutional objections, that this Court held invalid under the Commerce Clause in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 107 S. Ct. 2810 (1987).

OPINIONS BELOW

The opinion of the Washington Supreme Court, reprinted at App. A, is reported at 109 Wash. 2d 878, 749 P.2d 1286 (1988).

JURISDICTION

Appellant Taxpayers appeal from the final decision of the Washington Supreme Court rendered January 28, 1988. Notice of Appeal was timely filed in the Washington Supreme Court on February 26, 1988. App. B.

The Washington Supreme Court, although addressing the same taxes invalidated by this Court's decision in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 107 S. Ct. 2810 (1987), nonetheless ruled on remand that "it is as if the taxes collected pre-*Tyler* were constitutionally collected." App. 3a. Because the state court seemingly held that the statutory scheme invalidated in *Tyler* was constitutional until the moment this Court ruled it unconstitutional (i.e., for purposes of the taxes in issue here), an appeal lies under 28 U.S.C. § 1257(2) (highest state court upholds validity of state statute challenged as being repugnant to the Federal Constitution). If this interpretation of the holding should be deemed incorrect, the Court is respectfully requested to treat these papers as a Petition for Certiorari and to grant the writ. 28 U.S.C. § 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause (Art. I, § 8, cl. 3), Art. III, § 2, and the Supremacy Clause (Art. VI) of the United States Constitution and Revised Code of Washington (Wash. Rev. Code §§ 82.04.4286, 82.32.060, 82.32.150, 82.32.180) are reproduced in pertinent part at App. C.

STATEMENT OF THE CASE

This appeal is here following remand of this Court's decision in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, *supra*. That decision arose from appellant Taxpayers' actions for refund of specified taxes paid to the State of Washington. The

Taxpayers are engaged in interstate commerce: manufacturing in Washington and selling their goods in other states; manufacturing goods in other states and selling them in Washington; or a combination of these activities. The Washington Supreme Court rejected the Taxpayers' contentions that the Washington tax scheme violated the Commerce Clause.

This Court vacated the judgments of the Washington Supreme Court: "We conclude that our reasons for invalidating the West Virginia tax in *Armco* also apply to the Washington tax challenged here." *Tyler*, 107 S. Ct. at 2813, citing *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). As *Tyler* noted, the *Armco* Court had endorsed the dissent of an earlier case involving Washington's own tax: "In explaining why the tax [in *Armco*] was discriminatory on its face, we expressly endorsed the reasoning of Justice Goldberg's dissenting opinion in *General Motors Corp. v. Washington*, 377 U.S. at 459" *Tyler*, 107 S. Ct. at 2816. The *Tyler* Court considered its "square reliance in *Armco* on Justice Goldberg's earlier dissenting opinion . . . especially significant," explaining that it "dooms" Washington's attempt to distinguish *Armco*. 107 S. Ct. at 2817. Having already ruled inferentially on Washington's tax (through *Armco*'s "square reliance" on the Goldberg dissent), this Court concluded in *Tyler* that: "Washington's B&O tax scheme is therefore inconsistent with our precedents" *Id.* at 2820.

In remanding for remedy, the Court noted the State's plea for nonretroactivity advanced on the grounds that "the taxes at issue were assessed prior to our opinion in *Armco*" and that the holding there was "not clearly foreshadowed by earlier opinions." *Id.* Because of the potential application of state law and the possible need for an expanded record, this Court concluded that it would be appropriate for the Washington court to address the refund issue "in the first instance." *Id.* at 2822-23.

On remand, the Washington Supreme Court found no need for an expanded record and conceded that Washington statutory law mandates a refund of taxes unconstitutionally collected.¹ Nevertheless, the court denied *all* refunds, adopting what it called "pure prospective application," effective from June 23, 1987, the date of the *Tyler* decision. The court did not limit its consideration of prospective application to taxes collected *before* the 1984 *Armco* decision. App. 18a.

The court below acknowledged that the "threshold" test for nonretroactivity established by this Court requires a "new principle of law" that was "not clearly foreshadowed." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). The court purported to find such a "new" principle in *Tyler* despite (i) *Tyler's* repeated reliance on *Armco*, and (ii) the State's express admission that, immediately after *Armco*, its Department of Revenue and attorneys general had concluded that *Armco* "clearly" foreshadowed *Tyler*. On June 14, 1984, just two days after *Armco* was decided, the State's Director of Revenue wrote to Washington's Governor about the likely impact of *Armco* on Washington's B&O tax. Relying on advice from the Attorney General's office, the Director stated, in pertinent part:

In the opinion of our attorneys the reasoning of the Court in the *Armco* decision is clearly applicable to our statutory arrangement. . . .

App. 80a (Exhibit 32). Asserting that the opinions of the Revenue Department and Attorney General were "not binding" on it, the court relied on its own erroneous decision (reversed by this Court) in which it had failed to perceive the meaning of *Armco*:

¹ The Washington Supreme Court pronounced:

If the taxes were collected in violation of the constitution, then the state refund statutes would mandate refunds.

App. 2a.

Our unanimous decision . . . indicates we did not read *Armco* as foreshadowing the result in *Tyler*.

App. 5a.²

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

These taxpayers appeal because, despite this Court's invalidation of Washington's tax, the state court held that "for the purpose of applying the refund statutes it is as if the taxes collected pre-*Tyler* were constitutionally collected." App. 3a. Refunds were denied because the very taxes invalidated by this Court in *Tyler* were deemed by the court below to be nonetheless valid. Thus, *Tyler* was rendered inoperative as to the taxes that were before this Court (as well as the identical taxes collected from these same Taxpayers to the date of *Tyler*). This is unprecedented and offensive to the mandates of both Article III and the Commerce Clause of the United States Constitution.

The proper occasion for considering prospectivity is clear under this Court's decisions. As to the parties, the Court rules on a particular set of taxes in a live case or controversy before it. When the Court holds that particular taxes were unconstitutionally collected,³ that becomes the law of the case. The issue of prospectivity arises only in subsequent cases as to other taxpayers

² Later in its opinion, however, the Court impliedly acknowledged that *Armco* did indeed foreshadow *Tyler*:

We do not believe the *Armco* decision *so clearly* foreshadowed the outcome in *Tyler* that the State's reliance on the validity of the tax was unjustified or that prospective application would be inequitable.

App. 15a (emphasis added). The reference to "the State's reliance on the validity of the tax" is inappropriate since Exhibit 32 demonstrated that the State obviously recognized the deficiency of its tax and its refund liability.

³ The Washington Supreme Court has conceded that Washington law mandates the refund of such taxes. App. 2a.

who have paid similar taxes. To hold that nonretroactivity applies to the very taxes adjudicated would convert this Court's ruling into an advisory opinion—not deciding the actual case and controversy before the Court, but declaring what should be done if some future case or controversy arises. By failing to apply this Court's *Tyler* decision to the parties and taxes before the Court in that case, the court below defeated the Article III requirement that this Court decide "cases" or "controversies," as well as the state court's Article VI obligation to respect the supremacy of this Court's decisions.

Even in a subsequent case, where consideration of nonretroactivity would be appropriate, the "usual rule" is retroactive application of decisions; however, "nonretroactivity is appropriate in certain defined circumstances." *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987), citing *Chevron*, *supra*.⁴

The court below "reshaped" the three requirements of *Chevron* in a way that would provide states a virtual guarantee that they can retain the fruits of discrimination against interstate commerce. If the decision below should stand as precedent, states will have no difficulty satisfying all three of the "reshaped" *Chevron* circumstances in all cases where this Court invalidates state taxes for discrimination. That error is crucial to these parties because it effectively nullifies the decision this

⁴ For example, the "threshold" requirement for nonretroactivity under *Chevron* is that the prior decision, whose application is being considered in a pending case, must have established a "new principle of law." *Chevron*, 404 U.S. at 106. In light of *Tyler*'s heavy reliance on *Armco* and earlier cases, and its conclusion that "Washington's B & O tax is . . . inconsistent with our precedents" (107 S. Ct. at 2820), the court below is patently wrong in asserting that *Tyler* established a "new principle of law" that might justify nonretroactivity.

Court rendered to them in *Tyler*; but the broader and more lasting threat is the distortion of *Chevron's* exception to retroactivity so as to frustrate the very Commerce Clause policy this Court has sought to protect in *Tyler* and other cases. The substantial threat posed for interstate commerce will be addressed below. First, however, attention must be given to a fundamental question (which assumes that *Tyler* should be regarded as a new principle of law instead of a mere extension of earlier precedent): In light of Article III and the Supremacy Clause, may a state court on remand deny application of this Court's holding to the very litigants and the very taxes that were adjudicated by the Court to be unconstitutional?

I. The Decision Below Would Make This Court's *Tyler* Decision Merely Advisory.

So far as we can determine, the decision below represents the first time a state court, on remand, has refused to apply this Court's substantive constitutional determination to the parties. As such, the decision below calls into question this Court's obligation to consider only "cases" and "controversies," and to *decide* those controversies—as opposed to rendering only advisory opinions. Further, the decision below ignores the Supremacy Clause's mandate that state courts give *full* effect to this Court's pronouncements on federal constitutional matters. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); see also Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741 (1976); Wright, Miller & Cooper, *Federal Practice and Procedure* § 4468 (1981).

Last term, in *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), this Court ruled that Article III's "case" or "controversy" provisions require application of the Court's ruling to the parties immediately before the Court and "to all cases, state or federal, pending on direct review

or not yet final" *Id.* at 713-14, 716.⁵ While the Court's prospectivity analysis has not always been the same for civil and criminal cases,⁶ Article III's case or controversy limitation applies with equal force to both. See *Griffith's* analysis contrasting the Court's constitutional function of adjudicating specific cases with the role of the legislature. 107 S.Ct. at 713, *citing Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring).

Well before the decisional evolution that culminated in *Griffith*, the Court observed in the civil context: "Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the immediate litigation would be most unusual, especially where the rule announced was not innovative." *Simpson v. Union Oil Co.*, 396 U.S. 13, 15 (1969). Like the present case, *Simpson* began with a decision by this Court on an issue of substantive law, reserving a question of nonretroactivity. *Simpson v. Union Oil Co.*, 377 U.S. 13, 24-25 (1964). When the lower court, on remand, applied nonretroactivity to the parties,⁷ this Court reversed, stating: "The question we reserved was not an invitation to deny the fruits of successful litigation to this petitioner," but was limited to "parties in other cases" and to "whether in some of those other situations" equity might warrant nonretroactivity. 395 U.S. at 14. Consistently, the hallmark case for nonretroactivity, *Chevron Oil v. Huson*, *supra*, did not involve the litigants

⁵ This includes the cases of those, like amici curiae Amcord, Inc., *et al.*, in *Tyler*, who have filed suit under the same theory but whose actions were stayed until a definitive ruling in the lead case.

⁶ See *Griffith*, 107 S.Ct. at 713 n.8, *citing United States v. Johnson*, 457 U.S. 537, 563 (1982).

⁷ 270 F. Supp. 754, 757 (N.D. Cal. 1967), *aff'd*, 411 F.2d 897 (9th Cir. 1969).

who established the substantive principle of law to be applied.⁸

Last term, when the rule of a case resulted in a new, shortened period of limitations, the rule was applied retroactively to the parties. *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987).⁹ While the Court's opinion focused on the absence of the requisite "threshold" of *Chevron* (a "new principle of law"), *id.* at 2621-22, Justice O'Connor's concurrence emphasized Article III policy. Expressing doubt whether the Court's decision should be given *general* retroactive effect, Justice O'Connor agreed that "the Court should adhere to its policy of applying the rule it announces to the parties before the Court." *Id.* at 2636 (O'Connor, J., concurring on the retroactivity issue),¹⁰ citing *Stovall v. Denno*, 388 U.S. 293, 301 (1967).

In *Stovall*, a principle established earlier in *United States v. Wade*¹¹ and *Gilbert v. California*¹² was held not to apply retroactively to an alleged exclusionary error raised in *Stovall*'s habeas proceeding. However, Justice Brennan, writing for the Court, confirmed the "command of Article III" that the parties in *Wade* and *Gilbert* be given the benefit of the principle established in their cases as "an unavoidable consequence of the necessity

⁸ The substantive principle of law sought to be applied in *Chevron* was established in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969).

⁹ See also *Al-Khazraji v. St. Francis College*, 107 S. Ct. 2022 (1987), applying nonretroactivity to the shortened limitations period as to other parties.

¹⁰ See also Justice Powell's opinion, joined by Justices O'Connor and Scalia, agreeing that "the Court's ruling on the statute of limitations questions should apply to the parties in this case." 107 S. Ct. at 2631 (Powell, J., concurring in part).

¹¹ 388 U.S. 218 (1967).

¹² 388 U.S. 263 (1967).

that constitutional adjudications not stand as mere dictum." 388 U.S. at 301.¹³ *Accord Desist v. United States*, 394 U.S. 244, 254 n.24 (1969).

II. The Decision Below Undermines the Decisions of This Court That Seek To Protect Interstate Commerce From State Tax Discrimination.

Were nonretroactivity to be considered for possible application to the parties—a result clearly not countenanced by Article III or this Court's precedents—the test would be that of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The court below has "reshaped" the three-part test of *Chevron* to provide a virtual guarantee that states can keep the fruits of their discrimination—the "fruits of defeat."

¹³ The Court, speaking through Justice Brennan again in *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 458 U.S. 50 (1982) (invalidating the Bankruptcy Act of 1978 but applying *Chevron* to stay the judgment until Congress could enact a new law), acknowledged once more the necessity of nonetheless applying the decision of the case to the parties: "It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon." *Id.* at 87 n.40.

Unlike this Court, however, some Courts of Appeal have evidenced confusion about the Article III mandate. Compare *United States v. Cocks*, 399 F.2d 433, 451-52 (5th Cir. 1968), *cert. denied*, 394 U.S. 922 (1969) ("'Pure prospectivity,' even if constitutionally permissible, must be a matter of judicial grace sparingly invoked"), with *Ettinger v. Central Penn. National Bank*, 634 F.2d 120, 123-24 (3d Cir. 1980) ("Although we recognize that the Supreme Court has expressed reservations about applying a decision purely prospectively, see *Stovall v. Denno* . . . [W]e . . . reject the argument by amicus that Article III circumscribes the effect a federal court may give to its decisions"), and *Garcia v. San Antonio Metropolitan Transit Authority*, 838 F.2d 1411 (5th Cir. 1988). *Garcia*, however, seemingly misread this Court's treatment of the parties in *Northern Pipeline* and erroneously understood *Chevron* as a case involving the actual parties to a decision creating a new principle of law. See note 8, *supra*.

The eagerness of other state courts to advance state revenue interests in similar fashion—at the expense of interstate commerce—underscores the importance of the question presented. The decision below (and its peculiar version of *Chevron*) already has been embraced by the Arkansas Supreme Court to deny refunds of taxes paid both before and after this Court's decision in *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987).¹⁴ The Arkansas court refunded only limited amounts paid into escrow under an order entered by Circuit Justice Blackmun.¹⁵ Incredibly, the State was deemed not to have been “put on notice” by *Scheiner* that the taxpayers' claims were likely to succeed on the merits—even though this Court had vacated (on the basis of *Scheiner*) the prior Arkansas state court decision upholding the constitutionality of its tax.¹⁶

Other states have similarly profited from their discrimination.¹⁷ If allowed to stand, the Washington

¹⁴ *American Trucking Associations v. Gray*, No. 85-101, 1988 Westlaw 21852 (Ark. Mar. 14, 1988).

¹⁵ *American Trucking Associations, Inc. v. Gray*, 108 S. Ct. 2 (1987) (Blackmun, Circuit Justice).

¹⁶ *American Trucking Associations, Inc. v. Gray*, 107 S. Ct. 3252 (1987).

¹⁷ The inclination of state courts to apply *Chevron* for purely revenue protection purposes is evidenced by other recent state tax refund cases. See, e.g., *Penn. Mut. Life Ins. v. Dept. of Licensing and Reg.*, 162 Mich. App. 123, 412 N.W.2d 668 (1987) (tax invalidated on equal protection grounds based on this Court's decision in *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985)); *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), *appeal dismissed*, 107 S. Ct. 1949 (1987) (tax invalidated on Commerce Clause grounds based on this Court's *Armco* decision); *Metropolitan Life Ins. Co. v. Dept. of Ins.*, 373 N.W.2d 399 (N.D. 1985) (tax invalidated on equal protection grounds based on *Metropolitan Life Ins. Co. v. Ward*, *supra*); *Division of Alcoholic Beverages & Tobacco v. McKesson Co.*, No. 70368, 1988 Westlaw 12553 (Fla.

court's distortion of *Chevron* will encourage states to persist in discrimination for as long as possible, because they can readily satisfy the "reshaped" *Chevron* test in all cases where this Court invalidates state taxes for discrimination.

A. The Threshold Test: New Principle of Law.

Chevron's "new principle of law"¹⁸ or "clear break" with precedent requirement is the "threshold" test in nonretroactivity cases. *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982). In the decision relied upon in *Chevron* for this threshold requirement, the Court declined to find the requisite "sharp break" from prior precedent in the absence of "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 498 (1968). The Court contrasted the more usual development in the law based "to a great extent" on precedent, and thus merely an "extension of doctrines which had been growing and developing over the years." *Id.* at 499 (emphasis added).

Feb. 18, 1988), *rehearing pending* (tax invalidated on Commerce Clause grounds based on *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)).

In contrast to *Tyler*, these cases were not on remand, to provide a remedy as to a tax declared unconstitutional by this Court. Unlike Article III courts, state courts may be permitted by state constitutions to issue purely prospective, advisory opinions, at least when federal rights are not at stake. *Great Northern Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932).

¹⁸ A prior decision "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron*, 404 U.S. at 106. If the threshold requirement is not met, the analysis ends without resort to the other two tests of *Chevron*, as the court below recognized. App. 4a.

The court below found that *Tyler* was a clear break from this Court's prior decisions, including *Armco*, despite *Tyler*'s express reliance on those precedents. See, e.g., 107 S. Ct. at 2816 ("This statutory exemption . . . has the same *facially discriminatory consequences* as the West Virginia exemption we invalidated in *Armco*.") (emphasis added).¹⁹ Indeed, in *Tyler* the Court noted that it had expressly referenced Washington's tax in its *Armco* opinion.²⁰ 107 S. Ct. at 2817. Washington once had a tax much like the West Virginia tax invalidated in *Armco*. Washington's own court struck it down in *Columbia Steel Co. v. State*, 30 Wash. 2d 658, 192 P.2d 976 (1948). But, as *Tyler* observed: "Two years later, in 1950, the Washington legislature responded to [*Columbia Steel*] by turning the B & O tax exemption scheme inside out." 107 S. Ct. at 2814. The Court in *Armco* readily saw through the facade of Washington's new "inside-out" tax. *Armco* adopted an earlier opinion, *General Motors Corp. v. Washington*, 377 U.S. 436, 459 (1964) (5-4) (Goldberg, J., dissenting),²¹ addressing Washington's new scheme. 467 U.S. at 462. As this Court noted in *Tyler*, Justice Goldberg's analysis (which expressly addressed Washington's tax *after* it had been turned "inside out"), recognized the new tax as having

¹⁹ Far from being "new," even *Tyler*'s particular application of the principle that it applied (state taxes may not discriminate against interstate commerce) has been settled at least since *Maryland v. Louisiana*, 451 U.S. 725 (1981), and *Armco*, *supra*. Other express references to the linkage between *Tyler* and *Armco* can be found at 107 S. Ct. at 2818, 2820. See note 4, *supra*.

²⁰ The State of Washington had anticipated that the validity of its taxes would be affected by the Court's decision in *Armco* and had, therefore, filed an amicus brief in this Court. In it, Washington represented that its taxes remained "very similar to the West Virginia tax" struck down in *Armco*. Brief of the State of Washington as Amicus Curiae at 1, *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984).

²¹ Justices White and Stewart joined in Justice Goldberg's opinion.

the same economic effects as Washington's West Virginia-style tax previously struck down in *Columbia Steel*. 377 U.S. at 459, quoted in *Armco*, 107 S. Ct. at 2816. The Court concluded in *Tyler* that its "square reliance" in *Armco* on the Goldberg dissent doomed Washington's inside-out maneuver, as well. 107 S. Ct. at 2817.²²

The court below nonetheless concluded "that *Tyler* did establish a new principle of law" App. 11a. The court thus lowered the "threshold" requirement of *Chevron* to the vanishing point. This Court's express reliance on *Armco*, *Maryland v. Louisiana*,²³ and *Boston Stock Exchange v. State Tax Comm'n*²⁴ (see 107 S. Ct. at 2816-20), was ignored, as was Washington's own participation in *Armco* as *amicus curiae*. The court below turned a blind eye to the admission of Washington's Department of Revenue that "the reasoning of the Court in *Armco* is clearly applicable to our statutory arrangement." App. 80a. (Ex. 32; Memorandum from Director

²² As the Court explained:

Our square reliance in *Armco* on Justice Goldberg's earlier dissenting opinion is especially significant because that dissent dooms [Washington's] efforts to limit the reasoning of *Armco* to the precise statutory structure at issue in that case.

107 S. Ct. at 2817. *Tyler* thereupon invalidated the inside-out scheme for the same reasons that the old scheme had been struck down in 1948:

The current B & O tax exposes manufacturing or selling activity outside the state to a multiple burden The fact that the B & O tax "has the advantage of appearing nondiscriminatory," see *General Motors Corp.*, 377 U.S., at 460 . . . (Goldberg, J., dissenting), does not save it from invalidation. . . .

107 S. Ct. at 2820. The Court expressly dismissed the plurality decision in *General Motors* (which did not address the issue of discrimination against interstate commerce, nor involve the validity of Washington's manufacturing tax) as "not a controlling precedent." *Id.* at 2817.

²³ 451 U.S. 725 (1981).

²⁴ 429 U.S. 318 (1977).

of Revenue, on counsel of Attorney General's Office, to Governor of the State of Washington, dated June 14, 1984). Instead, the Washington court relied on *its own subjective failure* to see that the *Tyler* issues were controlled by *Armco, Maryland v. Louisiana*, and other prior decisions expressly relied upon by the Court in *Tyler*. According to the court below: "Our unanimous decision [in 1986] indicates *we* did not read *Armco* as foreshadowing the result in *Tyler*." App. 5a (emphasis added).

Every state court that has been (or will be) reversed can find a "new principle of law" by applying such a test.²⁵ The decision below would, therefore, render *Chevron's* threshold requirement a nullity. The question whether this Court has established a new principle of Commerce Clause law must be resolved by this Court's standards, not by the wholly subjective (and erroneous) perceptions of the very state court whose decision was reversed. Otherwise, there is nothing to prevent revenue-conscious state courts from turning this Court's Commerce Clause decisions into hollow advisory opinions under the guise of "prospective application."

B. Purpose Test: Whether Retrospective Application of a Rule Would Further or Retard Its Operation.

In those few instances where the threshold for non-retroactivity is met—where there really is a clear break with past precedent—the court must then weigh the merits and demerits of retroactivity "by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Chevron*, 404 U.S. at 107.

²⁵ All of the recent decisions in which this Court has been obliged to invalidate discriminatory state taxes (except one original action, *Maryland v. Louisiana*, *supra*) have involved reversals of decisions in which the state court was unable to perceive the discrimination. See cases cited in note 26.

The lower court's lip service to *Chevron's* second test also raises a substantial federal question in this case, because the rule whose application is denied is a Commerce Clause decision of this Court.²⁶ The court below was untroubled by *Chevron's* purpose test, reasoning that "whatever chill was imposed on interstate trade is in the past." App. 11a. It refused to acknowledge the incentive that its decision offers to future discrimination. States can hardly fail to see that if they persist in discriminatory taxation, they can retain all the fruits of that discrimination, because they are a product of the "past."²⁷

Washington's own conduct is a case in point. After *Columbia Steel* struck down its West Virginia-style tax in 1948, Washington turned the tax "inside-out" without changing its economic substance. Then, when *Armco* so obviously "doom[ed]" Washington's "inside-out" tax that the State's Director of Revenue and counsel were forced to acknowledge it (see App. F), the State consciously persisted in defending the "doom[ed]" tax and harvesting the fruits of discrimination for three more years.

²⁶ The importance of Commerce Clause protection against taxes favoring local over interstate commerce is emphasized by the frequency with which this Court has had to provide such protection. Currently, the Court has before it the appeal in *Goldberg v. Johnson*, 512 N.E.2d 1262 (Ill. 1987), *prob. juris. noted sub nom. Goldberg v. Sweet*, 108 S. Ct. 1010 (1988); and *New Energy Co. of Indiana v. Limbach*, 32 Ohio St. 3d 206, 513 N.E.2d 258, *prob. juris. noted*, 108 S. Ct. 500 (1987). In recent years, in addition to *Tyler*, such protection has been necessary in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); and *American Trucking Associations v. Scheiner*, 107 S. Ct. 2829 (1987); *Cf. Arizona Public Service Co. v. Sneed*, 441 U.S. 141 (1979).

²⁷ See, e.g., *American Trucking Ass'n v. Gray*, — S.W.2d —, 1988 Westlaw 21852 (Ark. Mar. 14, 1988).

If states can so easily retain, and even increase, their gains from discrimination, Commerce Clause "protection" is rendered meaningless. Discrimination against interstate commerce becomes profitable and risk free.

Equally important, the decision below "deprives the litigants, who have sustained the burden of attacking an unconstitutional statute, of the fruits of their victory" and may "discourage challenges to statutes of questionable validity." *Rio Algom Corp. v. San Juan County*, 681 P.2d 184, 186 (Utah 1984) (taxes refunded to the taxpayers who were parties). *Accord Strickland v. Newton County*, 244 Ga. 54, 258 S.E.2d 132, 134 (Ga. 1979) ("the plaintiff counties in these suits are entitled to the fruits of the holding that this Act is unconstitutional"); *see also Stovall v. Denno*, 388 U.S. 293, 301 (1967) (considering "the possible effect upon the incentive of counsel to advance contentions requiring a change in the law"). Taxpayers will seldom take the lead in attacking even the most blatantly unconstitutional tax if the litigating taxpayer is to be deprived of the fruits of the victory.

C. Inequity Test: Whether This Court's Decision Would Produce Inequitable Results If Applied Retroactively.

Finally, *Chevron* requires a weighing of any "inequity imposed by retroactive application." 404 U.S. at 107. The legitimate inquiry here is whether past events cannot be unwound without "injustice or hardship," *Id.*, citing *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (invalidating bonds issued under an unconstitutional law; applying the decision to the parties, other pending cases timely commenced, and other bond issues that could still be timely challenged; but giving prospective application as to bond issues for which the statutory time for challenge had expired).

The court below applied this test by asserting that "the expenditures made from this revenue during the many years for which refunds are sought cannot be undone" App. 15a.²⁸ Obviously, this will be so in every case where a state requires, as Washington does, that taxes must be paid *before* they can be contested in court. See Wash. Rev. Code § 82.32.150. The Washington courts denied injunctions against collection of the taxes prior to contest on the ground that the Taxpayers' right to refunds would be an adequate remedy if they prevailed on the constitutional issues. See, e.g., *Tyler Pipe Industries, Inc. v. Department of Revenue*, 96 Wn.2d 785, 786, 791, 638 P.2d 1213, 1214, 1216 (1982). When the Taxpayers did prevail, however, the state court denied them their refunds. Paying refunds of the taxes that had accumulated was thought to be a "hardship" and the taxpayers were deemed to have paid with "notice" of that result. App. 14a.

By insisting that taxes be paid before contest, the State created its own "hardship" that taxpayers were powerless to prevent. The weighing of equities per *Chevron* has been reduced to a "Catch 22" stratagem under

²⁸ In considering this equity prong, the court below has focused on a false issue. Dollars are fungible. (That fungibility is the justification for denying injunctions of tax collection, in favor of requiring payment with the right to obtain a refund of invalid taxes.) Therefore, whether the state can recover dollars it has spent is not the issue. The issue is whether the state is capable of repaying the amounts at stake to the taxpayers who were injured by being required to pay discriminatory taxes. In this case, the state has represented that it "has never claimed that it could not pay refunds" but only argued "that it would be inequitable" to require them. Brief of Respondent to Washington Supreme Court on Remand from the United States Supreme Court at 44. At any rate, any hardship involved in the state making a refund is precisely equal in amount to the hardship the state has imposed on the taxpayer by collecting the unconstitutional tax. Even if neither party were at fault, such a hardship should not be borne by the taxpayer who was the victim of the discrimination, but by the state, which created it.

which the state always wins. That will be the inevitable result in cases applying the Commerce Clause to state taxes.

It becomes apparent that all three *Chevron* tests will invariably be met in state tax discrimination cases, if applied as the court below did. A "new principle" will be found whenever a state court has failed to anticipate, appreciate, or understand the decision of this Court. When, as usual, a state has required taxpayers to pay taxes before contesting them, the "chill" on interstate commerce will always be in the "past." Revenues already spent will never be capable of being "undone" without "hardship." If the decision below is allowed to stand, tax discrimination against interstate commerce will be risk-free and profitable. This Court's decisions striking down invalid laws will be rendered advisory in effect by failing to remedy past discrimination and, if applied only prospectively, will be ineffectual to deter states from imposing taxes that discriminate against interstate commerce.

CONCLUSION

For the reasons expressed above, this Court should note probable jurisdiction and reverse the decision below.

Respectfully submitted,

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APPENDICES

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Nos. 51910-2 and 51110-1

NATIONAL CAN CORPORATION, *et al.*,
Appellants,

v.

THE DEPARTMENT OF REVENUE,
Respondent.

TYLER PIPE INDUSTRIES, INC.,
Appellant,

v.

THE DEPARTMENT OF REVENUE,
Respondent.

EN BANC OPINION

Filed January 28, 1988

UTTER, J.—This is a remand from the United States Supreme Court where various commercial enterprises (taxpayers) claimed Washington's multiple activities exemption to the business and occupation (B & O) tax, RCW 82.04.440, discriminated against interstate commerce in violation of the commerce clause, U.S. Const. art. 1, § 8. In *Tyler Pipe Indus., Inc. v. Department of Rev.*, — U.S. —, 97 L. Ed. 2d 199, 107 S. Ct. 2810 (1987) (hereinafter *Tyler*) the United States Supreme Court vacated and remanded this court's decisions in *Tyler Pipe Indus., Inc. v. Department of Rev.*, 105 Wn.2d

318, 715 P.2d 123 (1986) (hereinafter *Tyler Pipe*) and *National Can Corp. v. Department of Rev.*, 105 Wn.2d 327, 715 P.2d 128 (1986) (hereinafter *National Can*). In *Tyler Pipe* and *National Can*, this court held Washington's B & O tax exemption was valid under the commerce clause in that (1) there was a sufficient nexus between the interstate activities and the State, (2) it was fairly apportioned, (3) it was fairly related to the services provided, and (4) it did not discriminate against interstate commerce. The United States Supreme Court held there was sufficient nexus, and the tax was fairly apportioned, but found the multiple activities exemption discriminated against interstate commerce. The Court then remanded to this court to decide the refund issues raised by its ruling.

The decisive issues before this court are whether state law mandates refunds, and if not, whether this is an appropriate case for prospective application. We hold state law does not require refunds, and prospective application is appropriate.

I

STATE LAW

In order to reach the retroactivity issue, this court must first decide if Washington state statutory law or state case law mandates refunds of taxes paid prior to the Supreme Court's *Tyler* decision. If this state's tax refund statutes, RCW 82.04.4286 and RCW 82.32.060 apply, then all other issues are irrelevant.

This court has stated that, if a tax were in violation of the due process or commerce clauses, it would also be in violation of former RCW 82.04.430(6) (subsequently recodified as RCW 82.04.4286). *Chicago Bridge & Iron Co. v. Department of Rev.*, 98 Wn.2d 814, 819, 659 P.2d 463, appeal dismissed, 464 U.S. 1013 (1983). However, taxpayers' argument based on *Chicago Bridge* misconstrues the more basic inquiry at issue here. If the taxes

were collected in violation of the constitution, then the state refund statutes would mandate refunds. However, if the court finds the *Tyler* holding is to be applied only prospectively, then for the purposes of applying the refund statutes it is as if the taxes collected pre-*Tyler* were constitutionally collected. The statutory argument ignores the very meaning of prospective application. Washington case law does not support the proposition that tax refunds are always mandated when a statutory scheme is found to be unconstitutional. This court recently found a part of Washington's sales tax to be unconstitutional and yet gave only prospective application to its decision and afforded no refunds to taxpayers. *Bond v. Burrows*, 103 Wn.2d 153, 690 P.2d 1168 (1984). See also *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 786, 567 P.2d 631 (1977); *State ex rel. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 673, 384 P.2d 833 (1963).

II

RETROACTIVE OR PROSPECTIVE APPLICATION OF TYLER

Since Washington law does not foreclose an inquiry into prospective application, we turn to the factors enunciated by the United States Supreme Court to determine whether prospective application is to be afforded in this case. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971) sets out the three factors to be considered in deciding whether to give retroactive or prospective effect to a new rule in a federal civil case. *Tyler*, 107 S. Ct. at 2822. Courts must (1) determine whether the decision establishes a new principle of law either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) weigh the merits and demerits in each case by looking to the prior history of the rule in ques-

tion, its purpose and effect and whether retrospective operation will further or retard its operation; and (3) weigh the inequity imposed by retroactive application. *Chevron Oil*, at 106-07. (Although the tests for retroactive application in criminal cases have recently been reworked, the inquiry in civil cases is still controlled by *Chevron Oil*. *Griffith v. Kentucky*, — U.S. —, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987).)

A

NEW PRINCIPLE OF LAW

The threshold factor necessary for prospective application is a finding that the *Tyler* decision established a new principle of law overruling past precedent on which litigants may have relied. *Chevron Oil*, 404 U.S. at 106. This court's unanimous decisions in *National Can* and *Tyler Pipe*, the long line of cases upholding the Washington B & O tax, the fact that *Tyler* overruled past precedent on which the states may have relied, and Justice Scalia's dissent in *Tyler*, all compel the conclusion that *Tyler* did establish new principles of law.

In 1984 the United States Supreme Court invalidated West Virginia's wholesale gross receipts tax because it discriminated against interstate commerce. *Armco Inc. v. Hardesty*, 467 U.S. 638, 81 L. Ed. 2d 540, 104 S. Ct. 2620 (1984). In *National Can*, this court distinguished *Armco* based on the belief that Washington's selling and manufacturing taxes were exacted to address the same state burdens and hence were compensatory and therefore substantially equivalent. This court distinguished West Virginia's tax (which imposed substantially different tax rates on manufacturing and on wholesaling) from Washington's tax (which imposed identical rates on each activity), and reasoned that this difference was one reason which had precluded the Supreme Court from finding the West Virginia taxes to be compensatory.

We further held that the "internal consistency" rule is not applicable to a determination of discrimination in a gross receipts tax case. It was our belief that the Court in *Armco* had used the internal consistency concept only in the determination of whether Armco Inc. had to show actual harm once it had demonstrated the tax was facially discriminatory. For this reason we held the Washington tax was not facially discriminatory, and relied on previous holdings of the United States Supreme Court which had upheld Washington's B & O tax against commerce clause challenges and which were not expressly overruled in *Armco*.

The Supreme Court held, however, that the multiple activities exemption was facially discriminatory, and that manufacturing and wholesaling are not substantially equivalent activities. *Tyler*, 107 S. Ct. at 2818. The Court also held that the "internal consistency" rule was indeed to be applied in a gross receipts case where the allegation is that a tax on its face discriminates against interstate commerce. *Tyler*, 107 S. Ct. at 2820. The *Tyler* Court concluded the B & O tax exposes out-of-state manufacturing or selling activity to a multiple burden from which only manufacturing in-state and selling in-state are exempt. The Court stated that to the extent its conclusion was inconsistent with its ruling in *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964) that case was overruled.

Our unanimous decision in *National Can* indicates we did not read *Armco* as foreshadowing the result in *Tyler*. Taxpayers argue, however, that *Armco*'s reliance on Justice Goldberg's dissent in *General Motors* clearly informed this court that Washington's tax was unconstitutional. The Supreme Court in *Tyler*, discussing its *Armco* decision, said:

In explaining why the tax was discriminatory on its face, we expressly endorsed the reasoning of Justice Goldberg's dissenting opinion in *General Mo-*

tors Corp. v. Washington, 377 U.S., at 459. We explained:

"The tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it. Thus, if the property was manufactured in the State, no tax on the sale is imposed. If the property was manufactured out of the State and imported for sale, a tax of 0.27% is imposed on the sale price. See *General Motors Corp. v. Washington*, 377 U.S. 436, 459 (1964) (Goldberg, J., dissenting) (*similar provision in Washington, 'on its face, discriminated against interstate wholesale sales to Washington purchasers for it exempted the intrastate sales of locally made products while taxing the competing sales of interstate sellers'*); *Columbia Steel Co. v. State*, 30 Wash. 2d 658, 664, 192 P.2d 976, 979 (1948) (invalidating Washington tax)." 467 U.S., at 642.

(Italics ours.) *Tyler*, 107 S. Ct. at 2816. The italicized material is a description of Washington's pre-1950 statute which exempted intrastate sales on locally manufactured goods. Even though the *Armco* Court did quote Justice Goldberg's *General Motors* dissent, the parenthetical material following that citation referred *not* to the B & O tax statute at issue in *Tyler*, but to the tax which this court struck down in 1948 in *Columbia Steel Co. v. State*, 30 Wn.2d 658, 192 P.2d 976 (1948). Tracing the *Tyler* Court's quote back to Justice Goldberg's dissent in *General Motors*, it appeared that Justice Goldberg was discussing Washington's old B & O tax in the sentence which the *Armco* Court quoted. See *General Motors*, at 459. This was appropriate in *Armco* inasmuch as the West Virginia statute was similar to Washington's pre-1950 act. The *Armco* Court's reference to

Justice Goldberg's dissent in *General Motors*, without overruling the other cases on which we relied, did not clearly indicate to us the unconstitutionality of Washington's present tax statute. Not until the *Tyler* decision was it clear the Court was agreeing with Justice Goldberg's conclusion regarding Washington's newer B & O tax exemption and that earlier applicable commerce clause cases were being overruled.

Commerce clause challenges to the multiple activities exemption alleging discrimination against interstate commerce have many times been rejected by this court. See *B.F. Goodrich Co. v. State*, 38 Wn.2d 663, 231 P.2d 325, cert. denied, 342 U.S. 876 (1951); *Crown Zellerbach Corp. v. State*, 45 Wn.2d 749, 278 P.2d 305 (1954); *General Motors Corp. v. State*, 60 Wn.2d 862, 376 P.2d 843 (1962), *aff'd*, 377 U.S. 436 (1964); *Chicago Bridge & Iron Co. v. Department of Rev.*, 98 Wn.2d 814, 659 P.2d 463, *appeal dismissed*, 464 U.S. 1013 (1983). This court was clear in our *National Can* decision that because the West Virginia and Washington taxes differed significantly, we were relying on the

long history of the United States Supreme Court's treatment of this state's gross receipts tax as having withstood commerce clause challenges, *see Department of Rev. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978); *Standard Pressed Steel Co. v. Department of Rev.*, 419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975); *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964)...

National Can, at 339-40.

We believe Washington's rationale prior to the United States Supreme Court decision in *National Can* was a reasonable assessment of existing case law. In 1983 we held that Washington's B & O tax was not discriminatory

under the commerce clause. *Chicago Bridge & Iron Co.*, 98 Wn.2d at 832. The United States Supreme Court dismissed the appeal "for want of substantial federal question", *Chicago Bridge & Iron Co. v. Department of Rev.*, 464 U.S. 1013, 78 L. Ed. 2d 718, 104 S. Ct. 542 (1983). This court in *National Can* said it understood that dismissal to be a "decision on the merits". *National Can Corp. v. Department of Rev.*, 105 Wn.2d 327, 331, 715 P.2d 128 (1986) (citing *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.19, 58 L. Ed. 2d 740, 99 S. Ct. 740 (1979)). Since this decision issued only the year before *Armco* and addressed the very question at issue in *National Can*, we believed it to conclude that *Armco* did not clearly foreshadow *Tyler*. This court relied on the difference in the Washington and West Virginia statutes and, more importantly, directly on past Supreme Court precedent to uphold the B & O tax in *National Can*.

Also supporting the view that *Tyler* announced new law is Justice Scalia's dissent, which states that the *Tyler* decision "has no basis in the Constitution, and is not required by our past decisions" and that to apply the internal consistency rule, the "Court is compelled to overrule a rather lengthy list of prior decisions". *Tyler*, 107 S. Ct. at 2824 (Scalia, J., dissenting). The dissent notes that in *Williams v. Vermont*, 472 U.S. 14, 21-22, 86 L. Ed. 2d 11, 105 S. Ct. 2465 (1985), decided the term after *Armco*, the Court failed to apply the internal consistency rule. Justice Scalia wrote:

The holding of *Armco* thus establishes only that a facially discriminatory taxing scheme that is not internally consistent will not be saved by the claim that in fact no adverse impact on interstate commerce has occurred. To expand that brief discussion into a holding that internal consistency is always required, and thereby to revolutionize the law of state taxation, is remarkable.

(Italics ours.) *Tyler*, 107 S. Ct. at 2825 (Scalia, J., dissenting). Justice O'Connor concurred in *Tyler*, but did not read it to impose a requirement that the internal consistency rule be applied absent facial discrimination.

Kalama Chemical, representing in-state manufacturers, argues that as to that group *Tyler* did not enunciate a new principle of law. However, this argument ignores this court's reliance on the concept that selling and manufacturing were believed, until *Tyler*, to be substantially equivalent and therefore compensatory.

Taxpayers argue that a letter from the Department of Revenue to the Governor shows that the Department of Revenue believed just after the *Armco* decision that Washington's multiple activities exemption was unconstitutional. The letter from Donald Burrows, Director of Department of Revenue, to Governor John Spellman dated June 14, 1984, expresses the belief that the State faced substantial loss of tax revenue as a result of the *Armco* decision, and also expressed the likelihood of refunds. This argument is directed to the issue of whether the State justifiably relied on past federal and Washington cases to continue to act under the existing Washington statute.

Such a memorandum discussing an agency director's opinion of law is, of course, not binding on this court. Even had this opinion been stated in an official agency statutory construction or written in an attorney general opinion, it would not be binding on either the State or this court. *Walthew, Warner, Keefe, Arron, Costello & Thompson v. Department of Rev.*, 103 Wn.2d 183, 186, 691 P.2d 559 (1984); *Prante v. Kent Sch. Dist.* 415, 27 Wn. App. 375, 385, 618 P.2d 521 (1980). "The court is the proper body to determine the construction and interpretation of statutes. Thus, even when the court's interpretation is contrary to that of an agency charged with carrying out the law, it is ultimately for the courts to declare the law and the effect of the statute." *Nu-*

cleonics Alliance, Local 1-369 v. WPPSS, 101 Wn.2d 24, 29, 677 P.2d 108 (1984).

Even if the director's opinion was that *Armco* placed in question the constitutionality of the B & O tax, it was not within his power to stop collecting taxes under a statute which had been properly enacted by the Legislature. The Department of Revenue was collecting taxes under a statute that had been repeatedly upheld and also enjoyed the presumption of constitutionality. The party challenging the statute would have to prove its invalidity beyond a reasonable doubt. *High Tide Seafoods v. State*, 106 Wn.2d 695, 725 P.2d 411 (1986). The State is not estopped from arguing for prospective application of *Tyler* because it continued to collect taxes under a statute upheld by the trial court and this court because the *Armco* decision raised questions of constitutionality. A similar argument was discussed by the Supreme Court in *Lemon v. Kurtzman*, 411 U.S. 192, 36 L. Ed. 2d 151, 93 S. Ct. 1463 (1973). In *Lemon* state officials continued to act under a statute when they knew that it was obvious there would be a constitutional attack on the statute. The Supreme Court held that state officials are entitled to rely on a presumptively valid state statute, enacted in good faith and not plainly unlawful, and that until judges say otherwise, state officers have the power to carry forward the directives of the state legislature. *Lemon*, at 208-09.

The Department of Revenue may well have relied on the decisions of this court upholding the multiple activities exemption against commerce clause challenges, and there was nothing in the Supreme Court's decisions which clearly overruled this court's analysis until *Tyler* was decided last year. In *St. Francis College v. Al-Khazraji*, — U.S. —, 95 L. Ed. 2d 582, 107 S. Ct. 2022 (1987), the Court applied its decision prospectively because it had required a Court of Appeals to overrule its prior cases. *St. Francis*, 95 L. Ed. 2d at 589. As Justice

Traynor has pointed out, "[r]eliance plays its heaviest role in such areas as property, contracts, and taxation, where lawyers advise clients extensively in their planning on the basis of existing precedents." Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 *Hastings L.J.* 533, 543 (1977).

B

COMMERCE CLAUSE PURPOSE

Since we conclude that *Tyler* did establish a new principle of law, we must look to see if the purpose of the commerce clause will be furthered or retarded by retroactive application.

The central purpose of the commerce clause is to create an area of free trade among states. *American Trucking Ass'ns v. Scheiner*, — U.S. —, 97 L. Ed. 2d 226, 107 S. Ct. 2829 (1987). However, the Court was clear in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977) that interstate commerce may be made to pay its fair share of tax burdens. "After years of development of Commerce Clause jurisprudence, the Court has concluded that interstate friction will not chafe when commerce pays for the governmental services it enjoys." *Department of Rev. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 760, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978).

It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate trade is in the past and the Legislature has enacted law to attempt to comport with the new commerce clause taxation laws announced in *Tyler*. Laws of 1985, ch. 190; Laws of 1987, 2d Ex. Sess., ch. 3. The Supreme Court has noted that a state has "a significant interest in exacting from interstate commerce its fair share of the cost of state government." *Department of Rev. v. Association of Wash.*

Stevedoring Cos., *supra* at 748. If this court afforded retroactive application and ordered full refunds, taxpayers engaged in interstate commerce would pay no portion of their share of the tax burden. The multiple activities exemption is now known to be unconstitutional because it imposes the risk of multiple burdens on interstate commerce, but this is not to say that all taxes imposed on a manufacturer or wholesaler under the B & O tax were unfair or interfered with free trade among states. The very *risk* of multiple burdens is now enough (since *Tyler*) to invalidate the Washington exemption. But, forcing the State to collect no taxes for the entire period of the statute of limitations would be more in the nature of a punitive award for misconstruing the constitutionality of the B & O tax.

Dicta in *Tyler* suggested that the State could continue to tax under the B & O statute if the Legislature expanded the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other states. *Tyler*, 107 S. Ct. at 2821. The Washington Legislature has now enacted two credits whereby out-of-state manufacturers are afforded credits against Washington's selling tax for manufacturing tax paid to another state, and a credit whereby out-of-state sellers are afforded a credit against Washington's manufacturing tax for selling tax paid to another state. Laws of 1985, ch. 190; Laws of 1987, 2d Ex. Sess., ch. 3. Taxpayers now tell this court that most of the litigants would receive no credits or only very minimal credits under this legislation. This appears to be an admission that the *risk* of multiple burdens possible under the Washington B & O tax was not in fact an actual double burden for most of these litigants. The effect of complete retroactive application with refunds of all taxes paid would be to create a window of tax-free time for taxpayers involved in interstate commerce to the detriment of all other taxpayers.

Therefore, since the purpose of the commerce clause of free trade among the states is not enhanced by retroactive application and the effect of retroactive application would be to relieve some interstate taxpayers of their duty to pay their fair share of the tax burden, we must ask whether retroactivity would be inequitable.

INEQUITY IMPOSED BY RETROACTIVE APPLICATION

Taxpayers argue that denying refunds to litigants would discourage challenges to existing precedent. The taxpayers argue *Tyler* should be applied to them because they bore the burden of litigating the issue. They are essentially arguing for what is termed "quasi-prospective" application wherein the new rule applies retroactively to the parties to the overruling decision. Note, *Confusion in Federal Courts: Application of the Chevron Test in Retroactive-Prospective Decisions*, 1985 U. Ill. L. Rev. 117. If courts give successful litigants the benefit of the new rule, they have greater incentive to challenge existing rules. However, this singles out the successful litigant for special treatment while applying the old law to other people similarly situated. It also punishes other parties who relied on prior law and then lose in the overruling decision. 1985 U. Ill. L. Rev. at 128. In addition, in tax cases taxpayers always have the incentive to challenge potentially unconstitutional tax statutes to avoid future tax liability.

Taxpayer Tyler Pipe argues that, because the State argued against an injunction for the collection of taxes pending resolution of the constitutionality of the B & O tax, it now has an absolute right to a refund under the Washington refund statutes. This court denied the requested injunction not only because a remedy at law existed but also because Tyler Pipe failed to make the requisite showing of a likelihood of success on the merits. *Tyler Pipe Indus., Inc. v. Department of Rev.*, 96 Wn.2d

785, 794, 638 P.2d 1213 (1982). The fact that the State argued that taxpayers had an adequate remedy at law in the form of a possible refund should not mean the State is foreclosed from arguing that such a refund is not (under applicable preexisting law) now owed to the taxpayers. Because under Washington law a refund suit constitutes an adequate legal remedy foreclosing a preliminary injunction, it does not mean a successful taxpayer necessarily is entitled to retroactive application of his case. Taxpayers here were on notice that Washington and many other states afford prospective application to decisions finding tax statutes unconstitutional. *Ashland Oil, Inc. v. Rose*, — W. Va. —, 350 S.E.2d 531 (1986), *appeal dismissed*, 95 L. Ed. 2d 522 (1987); *Metropolitan Life Ins. Co. v. Commissioner of Dep't of Ins.*, 373 N.W. 2d 399 (N.D. 1985); *Bond v. Burrows*, 103 Wn.2d 153, 690 P.2d 1168 (1984); *Satorio v. Glaser*, 93 N.J. 447, 461 A.2d 1100, *cert. denied*, 464 U.S. 993 (1983); *Jacobs v. Lexington-Fayette Urban Cy. Gov't*, 560 S.W.2d 10 (Ky. 1977); *Pellnat v. Buffalo*, 59 A.D.2d 1038, 399 N.Y.S.2d 788 (1977); *Gulesian v. Dade Cy. Sch. Bd.*, 281 So. 2d 325 (Fla. 1973); *Hurd v. Buffalo*, 41 A.D.2d 402, 343 N.Y.S.2d 950 (1973); *Southern Pac. Co. v. Cochise Cy.*, 92 Ariz. 395, 377 P.2d 770 (1963). *But see Perkins v. County of Albemarle*, 214 Va. 416, 200 S.E.2d 566 (1973). Whether the taxes had been collected or still remained to be collected is not relevant to the issue of retroactive application. The *Ashland* court explained that it was irrelevant whether the disputed taxes had been paid or were simply assessed. *Ashland Oil, Inc. v. Rose*, *supra*. Both taxes collected and those assessed and unpaid fall within the prospective application of *Armco* and could be retained or collected by the State.

As the previous list of citations illustrates, many states including Washington have found it equitable to afford only prospective application to decisions invalidating taxing statutes. In *Bond v. Burrows*, *supra*, this court in-

validated the statutory scheme establishing a sales tax differential for border counties. After determining the tax statute violated the constitutional rule of proportionality, this court unanimously agreed to give the ruling only prospective application. Implicit in *Bond* is the fact that the court did not apply its decision so as to afford any refunds of past taxes to the counties which had paid higher taxes than the border counties.

Last year in *Ashland Oil, Inc. v. Rose*, *supra*, the West Virginia Supreme Court ruled that *Armco* would be applied prospectively. The West Virginia court determined that the reliance of the state on a presumptively valid tax outweighs injuries sustained on account of a holding of prospectivity.

The State's reliance on the constitutionality of the B & O tax was justifiable in light of decisions such as *Tyler Pipe Indus., Inc. v. Department of Rev.*, *supra*; *National Can Corp. v. Department of Rev.*, 105 Wn.2d 327, 715 P.2d 128 (1986); *Chicago Bridge & Iron Co. v. Department of Rev.*, 98 Wn.2d 814, 659 P.2d 463, *appeal dismissed*, 464 U.S. 1013 (1983); *Department of Rev. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978); and *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964). We do not believe the *Armco* decision so clearly foreshadowed the outcome in *Tyler* that the State's reliance on the validity of the tax was unjustified or that prospective application would be inequitable. As the court in *Salorio* noted, the expenditures made from this revenue during the many years for which refunds are sought cannot be undone, and reimbursement at this point would pose a significant hardship upon the State's existing financial requirements. *Salorio*, 93 N.J. at 465. Refunds sought in these cases alone exceed \$56 million and the State estimates refunds from 1980 through 1984 could be in excess of \$423 million. Given that the reliance was justified by the presumptive validity of the tax statute

and case law upholding that statute, retroactive application would be inequitable.

We turn now to taxpayers' argument that prospective application would violate due process and equal protection. Prospective application, designed to protect justifiable reliance on prior law and to respect the desire for stability in past transactions, was upheld by the Supreme Court against a due process challenge in 1932 in *Great Northern Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 77 L. Ed. 360, 53 S. Ct. 145, 85 A.L.R. 254 (1932). *United States v. Johnson*, 457 U.S. 537, 73 L. Ed. 2d 202, 102 S. Ct. 2579 (1982) reiterated the *Sunburst* rule that the federal constitution has no voice upon the subject of retroactivity and that the constitution neither prohibits nor requires retrospective effect be given to any new constitutional rule. (*Griffith v. Kentucky*, — U.S. —, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987), made some changes in the *Johnson* rationale in criminal settings, but reaffirmed that *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971) is to be used in civil cases.) Implicit in *Bond v. Burrows*, *supra*, is this court's opinion that retroactive application of a decision invalidating a tax is not constitutionally mandated.

In *Salorio v. Glaser*, *supra*, the New Jersey Supreme Court gave pure prospective effect to a decision declaring a tax statute unconstitutional and ruled that the plaintiffs were not entitled to reimbursement of taxes paid. That court held that "[t]he modern view is that invalidation of a statute does not automatically invalidate all prior transactions made in justifiable reliance upon the statute." *Salorio*, 93 N.J. at 463. Both the *Salorio* court and the *Ashland* court rely on *Lemon v. Kurtzman*, 411 U.S. 192, 36 L. Ed. 2d 151, 93 S. Ct. 1463 (1973) (*Lemon II*) wherein the Court refused to give retroactive application to its decision declaring a Pennsylvania statute unconstitutional. In *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971) (*Lemon I*) the

Court held unconstitutional a statute under which the state had reimbursed private sectarian schools for certain educational services. However, in *Lemon II* the Court permitted the state to pay the schools for services provided before its decision. The *Lemon* Court explained, “‘in the last few decades, we have recognized the doctrine of non-retroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases.’” *Lemon II*, at 197 (quoting *Chevron Oil Co. v. Huson*, *supra* at 106). The Court explained that its holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct “‘is subject to no set “principle of absolute retroactive invalidity” . . .’”. *Lemon II*, at 198-99 (quoting *Linkletter v. Walker*, 381 U.S. 618, 627, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965)). *Lemon II* also recognized that “statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity.” *Lemon II*, at 199.

The *Ashland* court recognized that

[a]lthough *Lemon II* is not a tax refund case and does not therefore provide direct and conclusive authority in this case, it provides the basis for applying the retroactivity analysis in the context of protecting state fiscal interests. *See also Cipriano v. Houma*, 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969) (decision holding unconstitutional Louisiana’s property-taxpayer limitation on franchise applied prospectively because retroactivity would impose significant hardship on cities, bondholders, etc.)

Ashland Oil, Inc., 350 S.E.2d at 536. In *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 77 L. Ed. 2d 1236, 103 S. Ct. 3492 (1983), the majority of the Supreme Court agreed that retroactive relief was not appropriate upon its finding that a state’s pension plan violated

U.S.C. Title VII. This court has also recognized that "courts possess the power to give their decisions prospective effect, *i.e.*, not to apply the decision to the parties in the overruling case." *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 785, 567 P.2d 631 (1977).

Taxpayers argue that denial of refunds violates equal protection in creating two classes of taxpayers—those whose refund claim is based on the discrimination of the B & O tax against interstate commerce and all others. However, they cite no relevant authority. The body of state and federal law previously cited in the tax area indicates this argument to be without merit. This court held that equal protection forbids all invidious discrimination but does not require identical treatment for all without recognition of difference in relevant circumstances. *Aetna Life Ins. Co. v. Washington Life & Disab. Ins. Guar. Ass'n*, 83 Wn.2d 523, 520 P.2d 162 (1974). In a recent tax case the Supreme Court stated: "In the equal protection context . . . if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 84 L. Ed. 2d 751, 105 S. Ct. 1676 (1985). Earlier this year this court held that equal protection challenges to state tax laws are (absent fundamental rights or suspect classifications) reviewed with a minimum level of scrutiny. *Cosro, Inc. v. Liquor Control Bd.*, 107 Wn.2d 754, 733 P.2d 539 (1987). A holding of pure prospectivity would divide taxpayers into two classes in regard to the time of the *Tyler* decision. Given the State's reliance on prior law, this is not a classification without a rational basis.

Having weighed the equities in this case, we conclude that pure prospective application from the date of the United States Supreme Court *Tyler* decision is appropriate, and appellants' claims for refunds before June 23, 1987, are denied.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Nos. 51910-2 & 51110-1
Thurston County No. 842019007 and 812007314

NATIONAL CAN CORPORATION,
KALAMA CHEMICAL INC., and
XEROX CORPORATION,
Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Respondent.

TYLER PIPE INDUSTRIES, INC., a Delaware corporation,
Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Respondent.

MANDATE

The State of Washington to: The Superior Court of the
State of Washington in and for Thurston County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on January 28, 1988, became the decision terminating review of this court in the above entitled case on February 17, 1988. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: No cost bills having been timely filed, costs are deemed waived.

[SEAL]

IN TESTIMONY WHEREOF, I have here-
unto set my hand and affixed the seal of said
Court at Olympia, this 18th day of February,
A.D. 1988

/s/ Reginald N. Shriver
REGINALD N. SHRIVER
Clerk of the Supreme Court
State of Washington

cc: Mr. Franklin Dinces, Mr. John Piper
Mr. Donald Young, Mr. James Lowe
& Mr. James Johnston
Mr. Thomas McKinnon
Mr. Thomas Sterken
Hon. Ken Eikenberry
Attorney General
Mr. James Tuttle, Asst.
Mr. William Collins
Reporter of Decisions

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 51910-2

NATIONAL CAN CORPORATION *et al.*,
Appellants,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,
Respondent.

NOTICE OF APPEAL

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES:

Notice is hereby given that National Can Corporation; Advanced Technology Laboratories, Inc.; A.H. Robins Company, Incorporated; Alaskan Copper Companies, Inc.; Alaska Pacific Seafoods, Inc.; Allis-Chalmers Corporation; Alpac Corporation; American Cyamid Company; AMF Head Sportswear, Inc.; AMF, Incorporated; AMF Voit, Inc.; Armstrong World Industries, Inc.; ASC Pacific, Inc.; Basic American Foods, Inc. aka AMPCO Foods, Inc.; Ben Hogan Company; Bethlehem Steel Corporation; Charles of the Ritz Group, Ltd., and its operating subsidiaries; Chrysler Corporation; Clark Equipment Company; Cominco American, Incorporated; Cominco Electronic Materials, Incorporated; Cummins Engine Company, Inc.; Data I/O Corporation; Edward Weck and Company, Inc.; E.R. Squibb & Sons, Inc.; Fentron Building Products Co., a division of Criton Technologies; The

Firestone Tire and Rubber Co.; Ford Motor Company; Foseco, Inc.; General Brewing Company; General Electric Company; G. Heileman Brewing Company, Inc.; Heath Tecna Aerospace Co., a division of Criton Technologies; Honeywell Inc.; International Paper Company; Jacqueline Cochran, Inc.; Kalama Chemical, Inc., Kal Kan Foods, Inc.; Kenai Salmon Packing Company; Korrry Electronics Co., a division of Criton Technologies; Lone Star Industries, Inc.; Longview Fibre Company; Mars, Inc.; E.M. Matson, Jr., Co.; Mattel, Inc.; Miller Brewing Company; Murray Pacific Corporation; National Can Corporation; Noel Canning Corporation; North Pacific Processors, Inc.; Peter Pan Seafoods, Inc.; Olympia Brewing Company; Pabst Brewing Company; Paragon Electric Co., Inc.; Quinton Instrument Company; R.A. Hanson Company, Inc.; RAHCO, Inc.; Rainier Brewing Co.; Reynolds Metals Corporation; Scott Paper Company; Shulton, Inc.; Spacelabs, Inc.; Square D Company; Thomasville Furniture Industries, Inc.; Trident Seafoods Corporation; Uncle Ben's, Inc.; U.S. Oil & Refining Co.; Welch Foods, Inc., a cooperative; Western Steel Casting Company; Westinghouse Electric Corporation; W.R. Grace & Co.; Xerox Corporation; appellants herein, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of the State of Washington, entered herein on January 28, 1988 denying appellant's claims for refunds.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED this 26th day of February, 1988.

BOGLE & GATES

/s/ D. Michael Young
D. MICHAEL YOUNG

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KING)

I hereby affirm and certify that service of the foregoing Notice of Appeal to the Supreme Court of the United States was made on the only party required to be served, by mailing true copies thereof to Respondent's attorneys, Kenneth O. Eikenberry, Attorney General, addressed to him at his office, Temple of Justice, Olympia, Washington 98504; and William B. Collins, Assistant Attorney General, addressed to him at his office, 415 General Administration Building, AX-02, Olympia, WA 98504, in the regular United States mail, postage prepaid, this 26th day of February, 1988.

/s/ D. Michael Young
D. MICHAEL YOUNG
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me this 26th day of February, 1988.

/s/ Shirley A. Doyle
Notary Public for the State of
Washington residing at Bellevue

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I:

Section 8. The Congress shall have Power . . . ;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

* * * *

United States Constitution, Article III:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different states,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * *

United States Constitution, Article VI:

* * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under

the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * *

Revised Code of Washington (1987) :

§ 82.04.4286 In computing tax there may be deducted from the measure of tax amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.

* * * *

§ 82.32.060 If, upon receipt of an application by a taxpayer for a refund . . . it is determined by the department that . . . a tax has been paid in excess of that properly due, the excess amount paid within such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at his option. . . .

* * * *

Any judgment for which a recovery is granted by any court of competent jurisdiction, not appealed from, for tax, penalties, and interest which were paid by the taxpayer, and costs, in a suit by any taxpayer shall be paid in like manner,

§ 82.32.150 All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.

* * * *

§ 82.32.180 Any person . . . having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund provided in chapter 82.32 RCW. . . .

The trial in the superior court on appeal shall be de novo The burden shall rest upon the taxpayer to prove that the tax as paid by him is incorrect, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the taxpayer shall be deemed the plaintiff, and the state, the defendant; Either party shall be allowed to appeal to the supreme court or the court of appeals in the same manner as other civil actions are appealed to those courts.

It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the director for a hearing in order to appeal to the superior court, but no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

* * * *

APPENDIX D

PARTIES TO THE PROCEEDING

APPELLANTS:

Advanced Technology Laboratories, Inc.
A.H. Robins Company, Incorporated
Alaskan Copper Companies, Inc.
Alaska Pacific Seafoods, Inc.
Allis-Chalmers Corporation
Alpac Corporation
American Cyanamid Company
AMF Head Sportswear, Inc.
AMF, Incorporated
AMF Voit, Inc.
Armstrong World Industries, Inc.
ASC Pacific, Inc.
Basic American Foods, Inc. aka AMPCO Foods, Inc.
Ben Hogan Company
Bethlehem Steel Corporation
Charles of the Ritz Group, Ltd. and its operating
 subsidiaries
Chrysler Corporation
Clark Equipment Company
Cominco American, Incorporated
Cominco Electronic Materials, Incorporated
Cummins Engine Company, Inc.
Data I/O Corporation
Edward Weck and Company, Inc.
E.R. Squibb & Sons, Inc.
Fentron Building Products Co., a division of Criton
 Technologies
The Firestone Tire and Rubber Co.
Ford Motor Company
Foseco, Inc.
General Brewing Company
General Electric Company
G. Heileman Brewing Company, Inc.

Heath Tecna Aerospace Co., a division of Criton
Technologies
Honeywell Inc.
International Paper Company
Jacqueline Cochran, Inc.
Kalama Chemical, Inc.
Kal Kan Foods, Inc.
Kenai Salmon Packing Company
Korry Electronics Co., a division of Criton
Technologies
Lone Star Industries, Inc.
Longview Fibre Company
Mars, Inc.
E.M. Matson, Jr., Co.
Mattel, Inc.
Miller Brewing Company
Murray Pacific Corporation
National Can Corporation
Noel Canning Corporation
North Pacific Processors, Inc.
Peter Pan Seafoods, Inc.
Olympia Brewing Company
Pabst Brewing Company
Paragon Electric Co., Inc.
Quinton Instrument Company
R.A. Hanson Company, Inc.
RAHCO, Inc.
Rainier Brewing Co.
Reynolds Metals Company
Scott Paper Company
Shulton, Inc.
Spacelabs, Inc.
Square D Company
Thomasville Furniture Industries, Inc.
Trident Seafoods Corporation
Uncle Ben's, Inc.
U.S. Oil & Refining Co.
Welch Foods, Inc., a cooperative

Western Steel Casting Company
Westinghouse Electric Corporation
W.R. Grace & Co.
Xerox Corporation

APPELLEE:

State of Washington, Department of Revenue

APPENDIX E

DESIGNATION OF CORPORATE RELATIONSHIPS

Appellants state that this is its original Designation of Corporate Relationships, listing appellants' parents, subsidiaries and affiliates, except for wholly-owned subsidiaries.

APPELLANT:	Advanced Technology Laboratories, Inc.
PARENT:	Squibb Corporation
SUBSIDIARY:	International Biomedics, Inc.
AFFILIATES:	Bach Mueller Company California Public Screening Inc. Charles of the Ritz S.A. Manufactureros Quimicos Farmaceuticos S.A. Ohmaco S.A. Sino American Shanghai Standard Pharmaceuticals Ltd. Squibb Nova Ltd. Squibb Connaught Squibb Industria Quimica, S.A. Squibb Pakistan Ltd. Squibb (Nigeria) Ltd. Squibb of Bangladesh Ltd. Symbotics Ltd. Von Heyden Gesellschaft Mit Beschränkter Haftung
APPELLANT:	A.H. Robins Company, Incorporated
PARENTS:	Stock of A. H. Robins Company, Inc. is publicly traded on the New York Stock Exchange. Corpora-

tions owning 5% or more of Appellant are:

Central Fidelity Bank
Republic Bank Corporation

SUBSIDIARY: Lee Laboratories, Inc.

AFFILIATES: Eurand Italia S.p.A.
Eurand International S.r.L.
Eurand Microencapsulation, S.A.
Pharia Industrial Company
A.H. Robins Farmaceutica, S.A.
Parfuns Caron, S.A.
Plastique et Parfum, S.A.
A.H. Robins Showa Co., Ltd.

APPELLANT: Alaskan Copper Companies, Inc.

PARENT: None

SUBSIDIARY: Leschi Boat Service

AFFILIATES: None

APPELLANT: Alaska Pacific Seafoods, Inc.

PARENTS: North Pacific Processors, Inc.
owned by Marubeni Corporation,
a Japanese corporation (Maru-
beni-Japan)

SUBSIDIARIES: None

AFFILIATE: Kenai Salmon Packing Co.

APPELLANT: Allis-Chalmers Corporation

PARENTS: Allis-Chalmers Corporation stock
is publicly traded on the New
York Stock Exchange. Corpora-
tions who own 5% or more of
Appellant's stock:

United Banks of Colorado
Equitable Life Assurance Society

BEA Associates
Pension Benefit Guaranty
Corporation

SUBSIDIARIES: Orissa Sponge Iron Limited
AC Furesa Andina S.A.
AC Iberia, S.A.
AFNE-Allis S.A.

AFFILIATES: Svenska Fluidcarbon AB
AAF Heat Recovery Limited

APPELLANT: Alpac Corporation

PARENT: Skinner Corporation

Alpac Corporation has no subsidiaries or affiliates.

APPELLANT: American Cyanamid Company

PARENTS: American Cyanamid Company
stock is publicly traded on the
New York Stock Exchange. No
corporation owns 5% or more of
Appellant's stock.

SUBSIDIARIES: Cyanamid Iberia, S.A.
Cyanamid India, Ltd.
Cyanamid Italia S.p.A.
Cyanamid Fothergill Ltd.
CYRO Industries
B. Braun-Dexon G.m.b.H.
Cyanamid Taiwan Corp.
TDF Tiofine B.V.
Mitsui-Cyanamid Ltd.
Lederle (Japan) Ltd.
Societe Des Sutures
Chirurgicales Robert &
Carriere-Lederle

AFFILIATES: None

APPELLANT: AMF Head Sportswear, Inc.

PARENTS:

Minstar, Inc. The following are the only corporations owning 5% or more, or beneficial interests in groups owning 5% or more, of Minstar, Inc.:

Jacobs Industries, Inc.
 MNR Holdings, Inc.
 Leucadia National Corporation
 LNC Investments, Inc.
 Charter National Life
 Insurance Company
 American Investment Company
 Leucadia, Inc.
 Uintah National Corporation
 TLC Associates
 The Bellfonte Company
 Pentad, Inc.

SUBSIDIARIES: None

AFFILIATES: Pioneer Corp.
 Enron Corporation
 Tidewater, Inc.

APPELLANT: AMF, Incorporated

PARENTS:

Minstar, Inc. The following are the only corporations owning 5% or more, or beneficial interests in groups owning 5% or more, of Minstar, Inc.:

Jacobs Industries, Inc.
 MNR Holdings, Inc.
 Leucadia National Corporation
 LNC Investments, Inc.
 Charter National Life
 Insurance Company
 American Investment Company
 Leucadia, Inc.
 Uintah National Corporation

TLC Associates
The Bellfonte Company
Pentad, Inc.

SUBSIDIARIES: None

AFFILIATES: Pioneer Corp.
Enron Corporation
Tidewater, Inc.

APPELLANT: AMF Voit, Inc.

PARENTS: Minstar, Inc. The following are the only corporations owning 5% or more, or beneficial interests in groups owning 5% or more, of Minstar, Inc.:

Jacobs, Industries, Inc.
MNR Holdings, Inc.
Leucadia National Corporation
LNC Investments, Inc.
Charter National Life Insurance Company
American Investment Company
Leucadia, Inc.
Uintah National Corporation
TLC Associates
The Bellfonte Company
Pentad, Inc.

SUBSIDIARIES: None

AFFILIATES: Pioneer Corp.
Enron Corporation
Tidewater, Inc.

APPELLANT: Armstrong World Industries, Inc.

PARENTS: Armstrong World Industries, Inc. stock is traded on the New York, Philadelphia, and Pacific Stock Exchanges. No corporation owns 5% or more of Appellant.

SUBSIDIARIES: Armstrong Cork Espana, S.A.
Armstrong World Industries
Pty. Ltd.

AFFILIATES: Inarco Limited
Armstrong Cork (Ireland)
Limited
Armstrong World Industries,
G.m.b.H.

APPELLANT: ASC Pacific, Inc.

PARENTS: BHP Holdings (USA) Inc.
(Wholly owned by Broken Hill
Proprietary Company, Ltd., an
Australian corporation.)

SUBSIDIARIES: None

AFFILIATES: Mineracao Wares
Utah Carriers
Marcona Conveyor Corporation
Waipipi Iron Sands
BHP Minerals
Hunter Valley Aluminum
COCE
IDM
Rheem
Pt. Rheem Indonesia
Rheem NZ
Amalgamated Superannuation
Fund
Rydalmere Nominees
Lypaght (Taiwan)
John Lysaght (Malaysia)
John Lysaght (PNG)
RMI Holdings
John Lysaght (South Pacific)
Societe Industrielle
Clinton International Corporation
Associate Airlines

APPELLANT: Basic American Foods, Inc.
aka AMPCO Foods, Inc.

Basic American Foods, Inc. is a privately held corporation. No corporation owns 5% or more of Appellant's stock, and Appellant has no subsidiaries or affiliates.

APPELLANT: Ben Hogan Company

PARENTS: Minstar, Inc. The following are the only corporations owning 5% or more, or beneficial interests in groups owning 5% or more, of Minstar, Inc.:

Jacobs Industries, Inc.
MNR Holdings, Inc.
Leucadia National Corporation
LNC Investments, Inc.
Charter National Life
Insurance Company
American Investment Company
Leucadia, Inc.
Uintah National Corporation
TLC Associates
The Bellfonte Company
Pentad, Inc.

SUBSIDIARIES: None

AFFILIATES: Pioneer Corp.
Enron Corporation
Tidewater, Inc.

APPELLANT: Bethlehem Steel Corporation

PARENTS: Bethlehem Steel Corporation stock is publicly traded on the New York Stock Exchange. The only corporation owning 5% or more of Appellant is United Banks of Colorado, Inc.

SUBSIDIARIES: Consep Membranes, Inc.
 Iron Ore Land Company
 Presque Isle Corporation
 Seadrill, Inc.
 Nubeth Joint Venture

AFFILIATES: Bethlehem Singapore Private
 Limited
 Empreendimentos Brasileiros
 de Mineracao
 S.A. - E.B.M.
 Mineracoes Brasileiras Reunidas-
 MBR
 G&A Limited Partnership III-A
 Griffin-Alexander International,
 Inc.
 Iron Ore Company of Canada
 Northern Land Company,
 Limited
 La Compagnie de Telephone
 Ungava
 Schefferville Power Company
 Twin Falls Power Corporation
 Limited
 Labrador Telephone Co.
 Restauradora de las Minas de
 Catorce, S.A. de C.V.
 Thailand Offshore Joint Venture
 Walbridge Coatings, an
 Illinois Partnership
 Rig V Limited Partnership
 Nordex Joint Venture
 Rig VI Limited Partnership
 Hibbing Taconite Company,
 a joint venture
 Ontario Iron Company

APPELLANT: Charles of the Ritz, Ltd. and
 its operating subsidiaries

PARENT:	Squibb Corporation
SUBSIDIARY:	Charles of the Ritz S.A.
AFFILIATES:	Bach Mueller Company California Public Screening Inc. International Biomedics, Inc. Manufactureros Quimicos Farmaceuticos S.A. Ohmaco S.A. Sino American Shanghai Standard Pharmaceuticals Ltd. Squibb Nova Ltd. Squibb Connaught Squibb Industria Quimica, S.A. Squibb Pakistan Ltd. Squibb (Nigeria) Ltd. Squibb of Bangladesh Ltd. Symbotics Ltd. Von Heyden Gesellschaft Mit Beschränkter Haftung
APPELLANT:	Chrysler Corporation
PARENTS:	No corporate shareholder owns 5% or more of Appellant's stock. Chrysler Corporation stock is traded on the New York Stock Exchange.
SUBSIDIARIES:	(Other than dealer corporations) Diamond Star Motors Corporation Mitsubishi Motors Corporation Officine Alfieri Maserati, S.p.A.
AFFILIATES:	None
APPELLANT:	Clark Equipment Company
PARENTS:	Clark Equipment Company stock is publicly traded on the New

York Stock Exchange. The only entities owning 5% or more of Appellant are:

Clark Equipment Company
Leveraged Employee Stock
Ownership Plan
United Banks of Colorado, Inc.
United Bank of Denver
Dean LeBaron Trustee for
Batterymach Financial
Management

SUBSIDIARIES: None

AFFILIATES: VME Group, N.V.
Transmisiones y Equipos
Mecanicos S.A. de C.V.

APPELLANT: Cominco American, Incorporated

PARENT: Cominco Holdings N.V.

Cominco American, Incorporated has no subsidiaries or affiliates.

APPELLANT: Cominco Electronic Materials,
Incorporated

PARENTS: Cominco American, Incorporated
Cominco Holdings N.V.

Cominco Electronic Materials, Incorporated has no subsidiaries or affiliates.

APPELLANT: Cummins Engine Company, Inc.

PARENTS: Cummins Engine Company stock
is publicly traded on the New
York Stock Exchange.

SUBSIDIARIES: CADEC Systems, Inc.
Consolidated Diesel Company
Cummins Nordeste, S.A.

Cummins Southwest, Inc.
 Dampers Iberica S.A.
 Dina Cummins, S.A.
 Energy Technologies, Inc.
 Hyperbar USA, INC.
 Kirloskar-Cummins Limited
 Onan Corporation
 Adept Technologies, Inc.

AFFILIATES: Williams Equine Products, Inc.

APPELLANT: Data I/O Corporation

PARENTS: Data I/O Corporation's stock is publicly traded over the counter in the National Market System. The only entities owning 5% or more of Appellant's stock are:

Bruce E. Gladstone
 The Independent Investment
 Company, Ltd.

Data I/O Corporation has no subsidiaries or affiliates.

APPELLANT: Edward Weck and Company, Inc.

PARENT: Squibb Corporation

SUBSIDIARY: Bach Mueller Company

AFFILIATES: California Public Screening Inc.
 Charles of the Ritz S.A.
 International Biomedics, Inc.
 Manufactureros Quimicos
 Farmaceuticos S.A.
 Ohmaco S.A.
 Sino American Shanghai
 Standard Pharmaceuticals Ltd.
 Squibb Nova Ltd.
 Squibb Connaught
 Squibb Industria Quimica, S.A.

Squibb Pakistan Ltd.
 Squibb (Nigeria) Ltd.
 Squibb of Bangladesh Ltd.
 Symbotics Ltd.
 Von Heyden Gesellschaft Mit
 Beschränkter Haftung

APPELLANT: E.R. Squibb & Sons, Inc.
PARENT: Squibb Corporation
SUBSIDIARIES: None
AFFILIATES: Bach Mueller Company
 California Public Screening Inc.
 International Biomedics, Inc.
 Manufactureros Quimicos
 Farmaceuticos S.A.
 Ohmaco S.A.
 Sino American Shanghai
 Standard Pharmaceuticals Ltd.
 Squibb Nova Ltd.
 Squibb Connaught
 Squibb Industria Quimica, S.A.
 Squibb Pakistan Ltd.
 Squibb (Nigeria) Ltd.
 Squibb of Bangladesh Ltd.
 Symbotics Ltd.
 Von Heyden Gesellschaft Mit
 Beschränkter Haftung

APPELLANT: Fentron Building Products Co.,
 a division of Criton Technologies
PARENTS: Criton Technologies, a New York
 partnership
 Criton Corporation
 Royal Zenith Inc.
 The Dyson Kissner Moran
 Corporation

B.S.D. Diversified Co., Inc.
The Bowery Savings Bank

Fentron Building Products Co. has no subsidiaries or affiliates.

APPELLANT: The Firestone Tire & Rubber Company

PARENTS: Stock of The Firestone Tire & Rubber Company is publicly traded on the New York, Midwest & Pacific Stock Exchanges. Corporations owning 5% or more of the Appellant are:

Banc One Corporation
Dean LeBaron d/b/a
Batterymach Financial
Management
United Banks of Colorado, Inc.

The subsidiaries of The Firestone Tire & Rubber Company other than Firestone are:

Industria Firestone de Costa Rica, S.A.
Firestone Italia S.p.A.
Liberian Metal Processing, Inc.
Firestone N.Z., Limited
Firestone Portuguesa S.A.R.L.
Firestone El Centenario, S.A.
Firestone Tire & Rubber Company of the Philippines
Firestone South Africa Limited
Firestone Hispania, S.A.
Siam Company Limited
Adela Investment Company

AFFILIATES: Companhia Brasileira de Borracha CBB
Vulcopneu

Centre Auto Aubagne La
 Martelle S.A.R.L.
 Sentrachem Limited
 Hopewell International
 Insurance Ltd.
 United Insurance Company
 Lone Star Transport Lines, Inc.
 Liberian Bank For Development
 & Investment

APPELLANT: Ford Motor Company

PARENTS: Ford Motor Company stock is publicly traded on the New York Stock Exchange. No corporate shareholder owns 5% or more of Appellant's stock.

SUBSIDIARIES: The subsidiaries of Ford Motor Company (other than wholly owned subsidiaries or corporations in which all the stock not held by Ford Motor Company is held by dealer-operators of Ford products) are:

Ford Motor Company of Canada,
 Limited
 Ford Brasil, S.A.
 Ford-Werke, A.G.
 Ford Motor Company
 (Belgium) N.V.
 Ford Motor Company A/S
 O/Y Ford A/B
 Ford Motor Company Aktiebolag
 Ford Nederland B.V.
 Eleveth Taconite Company
 Ford Lio Ho Motor Company Ltd.
 Renaissance Partnership

Fairlane Woods Association
 (A Partnership)
 Ceradyne Advanced Products, Inc.
 First Nationwide Network, Inc.

AFFILIATES: None

APPELLANT: Foseco, Inc.

PARENTS: Foseco Minsep, Inc. (Owned by
 Foseco Minsep PLC which is
 traded in Great Britain.)

SUBSIDIARIES: None

AFFILIATES: Greaves Foseco Ltd.
 Unicorn Industries PLC
 HH Wardle (Metals) Ltd.
 Foseco SAE
 Foseco Japan
 Fosven C.A.
 Fosroc Tremco Pty Ltd.
 Nonporite (NSW) Pty Ltd.
 Nonporite (QLD) Pty Ltd.
 Nonporite (WA) Pty Ltd.
 Nonporite (SA) Pty Ltd.
 Foseco S.A.
 Promedo-Sifraco SNC
 Craelius G.m.b.H.
 Fosbel Inc.
 Foseco Espanola S.A.
 Foseco S.A. de C.V.
 Foseco Hellas S.A.
 Fosam Ltd.
 Giesserei Dinest G.m.b.H.
 Fosroc Construction Chemicals
 Private Shareholding Co. Ltd.
 Foseco Argentina S.A.
 Exotermicos Monclava S.A.
 Foseco Industrial E Commercial
 Ltda.

Fosbel Brasil
 Foseco Minsep UAE Private Ltd.
 The Golden Gate Metallurgical
 Development Co.
 Celtite Inc.
 Foseco Korea Ltd.
 Foseco Iran SSK
 Fosbel Japan Ltd.
 Fosbel Europe B.V.
 Foseco Portugal Produtos
 Para Fundicao Lda.
 Foseco Minsep Inc.
 Van Mannekus Universal
 Forbeton Rhone Alps S.A.R.L.
 Forbeton Aquitaine S.A.R.L.
 Indimant Industridiamanten
 G.m.b.H.
 Toyoda Van Moppes KK
 Abrasives International Ltd.
 North Derbyshire Metal Products
 Ltd.
 Protecmat S.A.R.L.
 Van Straaten Universal
 Carborundum Universal Ltd.
 Forbeton S.A.
 LM Van Moppes Diamond Tools
 Ltd.
 Fosroc Chemicals

APPELLANT:	General Brewing Company
PARENTS:	S&P Company (aka Keller Street Development Co.)
SUBSIDIARIES:	None
AFFILIATES:	Pabst Brewing Company Falstaff Brewing Corporation
APPELLANT:	General Electric Company
PARENTS:	General Electric Company stock is publicly traded on the New York

Stock Exchange. No corporation owns 5% or more of Appellant.

SUBSIDIARIES:

Reuter-Stokes Canada Limited
Electromat S.A.

Iran Electrical and Mechanical
Services Co.

SADELMI-COGEPI Compagnia
Generale Progettazioni e
Installazioni S.p.A.

Societa Nazionale della
Officine de Savigliano
S.p.A.

General Electric de Mexico,
S.A. de C.V.

Joint Venture with Industrias
Unidas, S.A.

American General Electric
(Nigeria) Ltd.

Construcciones Industriales de
Maquinaria e Ingenieria, S.A.
Sadelmi-Nigeria Ltd.

General Electric
Electromedicina, S.A.

Sociedad Iberica de Contrucciones
Electricas

General Elektrik Turk
Anonim Sirketi

Sadelmi Limited

Adobe Canyon Corporation

Springer Mining Company

Osram Argentina Sociedad
Anonima Commercial e
Industrial

The China Car and Foundry
Company Limited (In
Liquidation)

CFM International, S.A.

Fabrications Mecaniques de
l'Atlantique S.A.

SNEF Electro Mecanique
 (S.E.M.)
 Elpro International Limited
 IGE (India) Limited
 Turbomotori Internazionale S.p.A.
 C&C International, Ltd.
 Drive System Company, Ltd.
 Engineering Plastics, Ltd.
 Eye Lighting Systems Corporation
 GEM Polymers Ltd.
 General Electric (U.S.A.)
 Industrial Automation, Ltd.
 Information Services
 International - Dentsu, Ltd.
 Japan Nuclear Fuel Company,
 Limited
 Toshiba Electric Systems Co. Ltd.
 Toshiba Silicone Company, Ltd.
 Yokogawa Medical Systems, Ltd.
 Samsung Medical Systems
 Brelec, S.A. de C.V.
 Diesel Industrial y Tractica
 S.A. de C.V.
 Generacion Electrica Nacional
 S.A. de C.V.
 Medidores Electromecanicos,
 S.A. de C.V.
 Ultrapol, S.A. de C.V.
 Donald Brown & Co. Ltd.
 IGE of Nigeria Ltd.
 Sadelmi Nigeria Limited
 A/S. Medirad
 Philippine Electric Corporation
 Jamjoom Electrical Distribution
 Assemblies Company Ltd.
 Svenska Medirad A.B.
 Taian Electric Manufacturing
 Company

United Asia Electric Company
 CBI Nuclear Company
 CFM International, Inc.
 Cool Water Coal Gasification
 Program
 Coherent General, Inc.
 High Voltage Breakers, Inc.
 Hydraulic Turbines, Inc.
 Industrial Networking, Inc.
 Locke Insulators, Inc.
 Otisca Industries, Limited
 Ringwood Avenue Joint Venture
 Assoc.
 General Electric de Uruguay S.A.
 Venezolana de Compresores y
 Motores S.A.
 Asahi Diamond Industrial
 Company, Limited
 Shinano Tokki, K.K.
 Toshiba Corporation
 General Electric (Kenya) Ltd.
 Marquette Electronics, Inc.
 Solomon Design Automation
 Systems
 Star Technologies, Inc.
 Vicom Systems, Inc.

AFFILIATES:

General Electric - Goninan
 Limited
 General Electric - Ricard Limited
 Sade Sul Americana de
 Engenharia S.A.
 CAMCO, Inc.
 Canadian General Electric
 Company Limited
 Constructors-Sadelmi
 International Ltd.
 Condisa S.A. Ingenieros
 Contratistas

Sud Americana de Electrificacion
 S.A.
 W.Q.S. France S.A.R.L.
 Quarzglas G.m.b.H.
 Westdeutsche Quarzschmelze
 G.m.b.H.
 Intersil India Limited
 Intersil Singapore (Pte.) Limited
 Watt & Akkermans Pte. Ltd.
 Sociedad Anonima de
 Ingerieros Contratistas
 Bates Turner, Inc.
 Sud Americana de Electrificacion
 S.A.
 Bunbury Rewinds Pty. Ltd.
 F. R. Tulk & Co. Pty.
 Limited (In liquidation)
 Goldfields Rewinds Pty. Limited
 Niart International, Inc.
 Valmet-Dominion, Inc.
 Consorcio Distral-SADE Ltda.
 (In liquidation)
 EASY, S.A. de C.V.
 Enseres Electrodomesticos,
 S.A. de C.V.
 Enseres Electroindustriales,
 SS. de C.V.
 ISLO, S.A. de C.V.
 POWER ELECTRICA, S.A.
 de C.V.
 TRAGESA, S.A. de C.V.
 Kvaerner-Calma A/S
 Philippine Appliance Corporation
 Philippine Glass Bulbs, Inc
 Pinagkaisa Realty Corporation
 Philacor Realty and Development
 Corporation

Saudi American General Electric
Company Limited
TUSAS Motor Sanayii A.S.
Reinsurance Systems Limited
A.P.-GERECCO Ltd.
Airport Tech Center Associates
American Oil and Gas
Corporation
Amwest Associates
Arvada-Fremont Developers
Atrium V Joint Venture
BMW Credit Corporation
Baconsfield Associates
Bayou Cogeneration Plant
Bayou Partners Limited
Brandemere Associates
Cardinal Cogen
Center Stage I Associates
CFC/GECC (New York)
Associates I
CFC/GECC (New York)
Associates II
Diamond Oaks Associates
Ebbert's Homes VI
Ebbert's Homes VII
Equipment Financing Associates
Executive Center West Associates
FGIC Corporation
Financo Investors Fund L.P.
Financo Investors Management
Partnership L.P.
Gleneagle Associates
Guinness Peat Aviatim
Huntington Glen Associates
Kirby Fletcher Stamford, Ltd.
Kramer Capital Corporation
Lonestar Florida Holding, Inc.
Marquette Center Associates I

Millicent Way Associates
Mira Mesa R&D Associates
Northchase One Associates
Northchase Two Associates
Northern Oaks Associates
Northern Telecom/General
Electric Credit Associates
Ozona Development Drilling
Partnership I
Ozona Development Drilling
Partnership II
Ozona Development Drilling
Partnership III
Park Place Developers, Ltd.
Pathfinder Mines Corporation
Patrick Petroleum Corporation
Drilling Program No. 1
Patrick Petroleum Corporation
South Louisiana Five Well
Investment Package
Pear Tree Joint Venture
Pellicano Business Center
Associates
Pierremont Phase II Associates
Plum Tree Dallas Associates, Ltd.
Powers Pointe Associates
Regency Park
Renner Plaza Associates
Racom Corporation
Rolling Hills Ranch
Structural Dynamics Research
Corporation
SGE (New York) Associates I
SGE (New York) Associates II
Summit Oakes Associates
Timberglen Associates
VHD Electronics, Inc.
Vandenberg Country Club

Wainoco Appalachian
 Stamford, Ltd.
 Watkins Equity Leasing
 Wiles Associates
 Woodlands Corporate Ctr. II
 Manufacturera de Aparatos
 Domesticos S.A.
 Turbinas y Mecanica C.A.
 Vidriolux, C.A.
 SADE Sociedad Anonima
 Constructora, Commercial,
 Industrial, Financiera,
 Inmobiliaria y de Mandatos
 Jones and Rickard (Pty.) Limited
 Banco Brasileiro de Investimentos
 Ipiranga S.A. (In liquidation)
 UMON-Engenharia de
 Montagem Ltda.
 Canadian Nuclear Equipment
 Suppliers Limited
 TUSAS Aerospace Sanayii A.S.
 Industrias Electronicas S.A.
 Sociedad Financiera Credival C.A.
 APA Ventures II Limited
 Anadigics, Inc.
 Analogic Corporation
 Applied ImmuneSciences, Inc.
 Applied Information Memories
 Applied Materials, Inc.
 Arlington Cable Partners
 Avanti Communications Corp.
 Axiom Computers, Inc.
 Biological Energy Corp.
 Brooke & Mack, Inc.
 CGX Corp.
 Cadre Technologies, Inc.
 Canaan Computer Corp.
 Commterm, Inc.

Computer Aided Design Group,
Inc.
Computer Thought Corp.
Corporate Traffic
Management, Inc.
Crop Genetics International N.V.
Crosspoint Venture Partners II
EnMasse Computer Corp.
Fairfield Venture Capital
Fund L.P.
Galileo Electro-Optics Corp.
Gigabit Logic, Inc.
Health Stop Medical
Management, Inc.
Hercules Limited Partnership
Interest
Hercules Offshore Drilling Co.
I-Scan Corp
Ibis Systems, Inc.
Kleiner, Perkins, Caufield &
Byers II
Kleiner, Perkins, Caufield &
Byers II Annex
Koala Technologies Corp.
Kurta Corp.
Laserpath Corp.
Masstor Systems Corp.
Medical and Scientific
Designs, Inc.
Megatape Corp.
Mobile Satellite
Communications Corp.
Morris Decision Systems, Inc.
Multiflow Computer, Inc.
Nellcor, Inc.
Netra Corp.
Octel Communications Corp.
Omni-Flow, Inc.

Perceptron, Inc.
Prime Capital L.P.
Raster Technologies, Inc.
Saber Technology Corp.
Scientific Computer Systems, Inc.
SEEQ Technologies, Inc.
Silicon Compilers, Inc.
Stratus Computer, Inc.
Sydis, Inc.
Symbolics, Inc.
TeleSoft, Inc.
UTI Instruments Co.
Vitalink Communications Corp.
Ztel, Inc.
Burndy Corp.
Hughes Tool Co.
Cedar Creek Associates
RCA/Sharp Microelectronics, Inc.
Page America Group, Inc.
Philippine Global
Communications, Inc.
Center for Advanced Television
Studies
Earth Observation Satellite Co.
Lodgistix Inc.
Microelectronics and Computer
Technology Corp.
Planar Systems, Inc.
Semiconductor Research Center
Hearst/ABC-RCTV
RCA/Columbia Pictures Home
Video
Screen Sport, LTD.
RCA/Ariola Europe, Ltd.
RCA/Ariola International
(Australia)
RCA/Ariola International
(Brazil)

Record Service Benelux N.V.
 RCA/Ariola International
 (Canada)
 Ariola/RCA Musik G.m.b.H.
 Arbos Musicverlag Hans Gerig
 K.G.
 Dean Records Musicproductions-
 und-Verlagsgesell G.m.b.H.
 MSC Music Center
 Trontragervtrebs G.m.b.H.
 Edizioni Musicale Acqua Azzura
 S.r.L.
 Resolute Casa Editorice Musicale
 S.r.L.
 RVC Corp.
 RCA/Ariola International
 S. de R.l. de C.
 Record Service Benelux B.V.
 RCA S.A. (Spain)
 RCA/Ariola Limited (U.K.)
 RCA/Columbia Pictures
 International Video
 Gaumont-Columbia Films RCA
 Video
 Vertriebsgellschaft RCA/Columbia
 Pictures Video G.m.b.H. & Co.,
 K.G.
 RCA Columbia Pictures Video
 S.p.A.
 CIC Video-RCA/Columbia
 Pictures Video S.R.C.
 RCA/Columbia Pictures Video,
 U.K.
 Transradio Chilena Compania de
 Telecomunicaciones S.A.
 RCA/Ariola International
 (New York)

APPELLANT: G. Heileman Brewing Company, Inc.

PARENTS: G. Heileman Brewing Company, Inc. stock is publicly traded on the New York Stock Exchange. The only entity owning 5% or more of Appellant is Batterymach Financial Management.

G. Heileman Brewing Company, Inc., has no subsidiaries or affiliates.

APPELLANT: Heath Tecna Aerospace Co., a division of Criton Technologies

PARENTS: Criton Technologies, a New York partnership
 Criton Corporation
 Royal Zenith Inc.
 The Dyson Kissner Moran Corporation
 B.S.D. Diversified Co., Inc.
 The Bowery Savings Bank

Heath Tecna Aerospace Co. has no subsidiaries or affiliates. .

APPELLANT: Honeywell Inc.

PARENTS: Honeywell Inc. stock is publicly traded on the New York Stock Exchange. No corporation owns 5% or more of Appellant.

SUBSIDIARIES: Votan
 Honeywell-Ericsson Development Company
 Honeywell-Sharecom Houston
 Honeywell AG
 Honeywell Turki-Arabia LTD.

Goldstar-Honeywell Company,
LTD.
NEC Honeywell Space Systems
Honeywell B.V.

AFFILIATES:

Magnetic Peripherals Inc.
Societe De Promotion
Commerciale Bull S.A.R.L.
Peripheral Components Inc.
Optical Peripherals Lab
Data Management S.p.A.
RSO Futura S.r.L.
Societa Iniziative Commerciali
Industriali Tecniche S.p.A.
Sicit
Sviluppo Informatica Sistemi
Aziendali S.p.A. Sisa
Societa Italiana Servizi
Technici Ed Organizzativi
S.p.A. Sisto
Hong Leong Honeywell Sdn. Bhd.
Honeywell Sistemas Informacion,
S.A. DE C.V.
Mexicanna Industrial Honeywell,
S.A. DE C.V.
IPC-ISSC-Automation
G.m.b.H. and Co., KG
Compagnie CII-HB
Internationale N.V.
Honeywell Bull, S.A. (Belgium)
ABC-BULL Telemacatie S.A.
CII Honeywell Bull Systems N.V.
Honeywell Bull A.G.
Sociedade Portuguesa Honeywell,
Bull, LDA.
Honeywell Bull, S.A. (Spain)
Datasytem, S.A.
Honeywell Do Brasil & Cia.

Saudi Arabian Tetra Tech
 Limited
 CDA-Weeks, A joint venture
 Pyromeca S.A.
 Cometa S.A.
 Honeywell ET Compagnie
 Honeywell Europe S.A.
 Holding K.G.
 Honeywell India Limited
 Yamatake-Honeywell Co., LTD.
 Taishin Co., LTD.
 Yamatake Engineering Service
 Co., Ltd.
 IPC Espana, S.A.
 Yamatake and Co., Ltd.
 Honeywell Kuwait K.S.C.
 Dienes-Honeywell G.m.b.H.
 FEG Gesellschaft Fur Logistik
 Arbeitsmedizinische
 Betreuungsgesellschaft
 Kieler Betriebe G.m.b.H.
 Centra-Buerkle G.m.b.H.
 Bull S.A.
 CII Honeywell Bull Congo
 OY Honeywell Bull AB
 Bull CP8
 CII Honeywell Bull Afrique, S.A.
 CII Honeywell Bull
 Cameroun S.A.R.L.
 CII Honeywell Bull Gabon
 S.A.R.L.
 CII Honeywell Bull Cote
 D'Ivoire S.A.
 CII Honeywell Bull Niger
 S.A.R.L.
 CII Honeywell Bull Senegal
 S.A.R.L.

Compagnie Francaise
 D'Investissements Prives
 (COFIP)
 Societe Internationale Pour
 L'Innovation
 CII Honeywell Bull Systems
 Bull Peripherals G.m.b.H.
 Honeywell Bull S.A.L.
 Honeywell Bull, Madagascar
 Honeywell Bull Maroc S.A.
 Mirco Card Technologies Inc.

APPELLANT: International Paper Company
 PARENTS: International Paper Company stock
 is publicly traded on the New
 York Exchange. No corporation
 owns 5% or more of Appellant.
 SUBSIDIARIES: Arizona Chemical Company
 International Paper Capital
 Formation, Inc.
 Societe Mediterraneenne,
 D'Emballages
 Corporacion Forestal De
 Venezeula, C.A.
 Envases Internacional, S.A.
 Forest Insurance Limited
 International Paper Korea Ltd.
 IPI Corporation
 Paper Industries Corporation
 of the Philippines
 Productora De Papeces, S.A.
 Rouviere Company
 Sicilcartone, S.r.L.
 AFFILIATES: None

APPELLANT: Jacqueline Cochran, Inc.
 PARENTS: American Cyamaid Company
 Jacqueline Cochran, Inc. has no subsidiaries or affiliates.

APPELLANT: Kalama Chemical, Inc.

PARENTS: Kalama Chemical, Inc. is a privately held corporation. The only corporations owning any stock in Kalama are:
 The Dow Chemical Company,
 Norwest Growth Fund, Inc.,
 Shriner's Hospital, and The
 British Columbia Sugar
 Refining Company, Ltd.

Other than their passive ownership interests, none of these corporations are affiliated with Kalama.

SUBSIDIARIES: Kalama Foreign Sales Corporation
 Kalama International, Ltd.

AFFILIATES: Seville Trading Co. Ltd.
 Kalama International, a joint venture
 Chatterton, Inc.

APPELLANT: Kal Kan Foods, Inc.

PARENT: Mars, Incorporated

Kal Kan Foods, Inc. has no subsidiaries or affiliates.

APPELLANT: Kenai Salmon Packing Co.

PARENT: North Pacific Processors, Inc. owned by Marubeni Corporation, a Japanese corporation (Marubeni-Japan).

SUBSIDIARIES: None

AFFILIATES: Alaska Pacific Seafoods

APPELLANT: Korry Electronics Co., a division of Criton Technologies

PARENTS: Criton Technologies, a New York
partnership
Criton Corporation
Royal Zenith Inc.
The Dyson Kissner Moran
Corporation
B.S.D. Diversified Co., Inc.
The Bowery Savings Bank

Criton Technologies has no subsidiaries or affiliates.

APPELLANT: Lone Star Industries, Inc.

PARENTS: Lone Star Industries, Inc. stock is
publicly traded on the New York
Stock Exchange.

SUBSIDIARIES: Arm-Star Venture Associates
Compania Nacional de Cemento
Portland
Dixon-Marquette Cement, Inc.
General Hydrocarbons Polymer
Concrete Inc.
Lone Star-Falcon
Lone Star-KC Concrete Tie
Company
Lone Star Prestress Concrete, Inc.
Northwest Aggregates Co.
Pacific Coast Cement Corporation
Polycon Research, Inc.
Polymer Concrete Research, Inc.
Pyrament N.V.
Quazite Corporation

AFFILIATES: Angaston Holdings Ltd.
Campania de Cimento
Salvador S.A.
Canteras de Riachuelo S.A.
Cemento San Martin S.A.
Hawaiian Cement

Hawaii Pier 32 Holding
 Corporation
 Lonestar Florida Cement, Inc.
 Lonestar Florida Holding, Inc.
 Lone Star Hawaii, Inc.
 Lone Star Hawaii Cement
 Corporation
 Lone Star Hawaii Rock
 Products, Inc.
 Lone Star Hawaii Services, Inc.
 Plastibeton Canada Inc.
 Plastibeton Inc.
 Riachuelo S.A.
 Stresscon, partnership
 San-Vel Santa Fe J/V
 CACP Cementus S.A.
 Lone Star Hawaii Construction,
 Inc.
 Lone Star Hawaii Properties, Inc.
 Cimento Maua S.A.
 Marcomin Participacoes Ltda.
 Qualimat Distribuicoes de
 Materiais de Construcao S.A.
 Minsisiso Campeao Ltda.
 Campeao Participacoes Ltda.
 Maporte Transportadoes Ltda.
 Cimentos Aluminosos
 Cialmig-Lafarge Ltda.

APPELLANT:

Longview Fibre Company

PARENTS:

Longview Fibre Company is a privately held corporation. No corporation owns 5% or more of Appellant's stock and Appellant has no subsidiaries or affiliates.

APPELLANT:

Mars, Inc.

PARENTS:

Mars, Inc. is a privately held corporation, and Appellant has no subsidiaries or affiliates.

APPELLANT:	E. M. Matson, Jr., Co.
PARENTS:	E. M. Matson, Jr., Co is a sole proprietorship. Appellant has no subsidiaries or affiliates.
APPELLANT:	Mattel, Inc.
PARENTS:	Stock of Mattel, Inc. is publicly traded on the New York Stock Exchange. Corporations owning 5% or more of Appellant are: Warburg, Pincus Capital Partners, L.P. E.M. Warburg Pincus & Co., Inc. RJR, Ltd. WDR, Ltd. Camont Investments, Inc.
SUBSIDIARIES:	Mattel Molds, Ltd. (Taiwan) Ma-ba Corporation (Japan)
AFFILIATES:	None
APPELLANT:	Miller Brewing Company
PARENTS:	Philip Morris Companies, Inc. Philip Morris Inc.
Miller Brewing Company has no subsidiaries or affiliates.	
APPELLANT:	Murray Pacific Corporation
PARENTS:	Murray Pacific Corporation is a privately held corporation. No corporation owns 5% or more of Appellant and Appellant has no subsidiaries or affiliates.
APPELLANT:	National Can Corporation
PARENT:	Triangle Industries, Inc.
SUBSIDIARIES	None

AFFILIATES:	Central Jersey Industries Avery, Inc. Nippon National Seikon Co. National Can Italiana, S.p.A. Nacanco SUD S.p.A. National Can Iberica, S.A.
APPELLANT:	The Noel Corporation d/b/a Noel Canning Corporation
PARENTS:	Noel Canning Corporation is a privately held corporation. No corporation owns 5% or more of Appellant's stock, and Appellant has no subsidiaries or affiliates.
APPELLANT:	North Pacific Processors, Inc.
PARENT:	Marubeni Corporation, a Japanese corporation (Marubeni-Japan)
SUBSIDIARIES:	Alaska Pacific Seafoods, Inc. Kenai Salmon Packing Co.
AFFILIATES:	None
APPELLANT:	Peter Pan Seafoods, Inc.
PARENT:	Nichiro Gyogyo Kaisha, Ltd.
SUBSIDIARIES:	Peninsula Salmon, Inc. Peter Pan Communications, Inc. SeaBlends Food Company, Inc. Seven Seas Fishing Company, Inc. Astoria Warehousing, Inc.
AFFILIATES:	Nichiro Pacific, Ltd.
APPELLANT:	Olympia Brewing Company
PARENTS:	Pabst Brewing Company is successor in interest as of 12/31/83. Pabst is owned by S&P Company.

SUBSIDIARIES:	None
AFFILIATES:	Falstaff Corporation General Brewing Company
APPELLANT:	Pabst Brewing Company
PARENT:	S&P Company (aka Keller Street Development Co.)
SUBSIDIARIES:	None
AFFILIATES:	Falstaff Corporation General Brewing Company
APPELLANT:	Paragon Electric Co., Inc.
PARENTS:	Paragon Electric Co., Inc. is a privately held corporation. No corporation owns 5% or more of Appellant. Paragon has no subsidiaries or affiliates.
APPELLANT:	Quinton Instrument Company
PARENT:	A.H. Robins Company, Incorporated
SUBSIDIARIES:	None
AFFILIATES:	Lee Laboratories, Inc. Eurand Italia A.P.A. Eurand International S.r.L. Eurand Microencapsulation, S.A. Pharia Industrial Company A.H. Robins Farmaceutica, S.A. Parfums Caron, S.A. Plastique et Farfume, S.A. A.H. Robins Showa Co., Ltd.
APPELLANT:	R.A. Hanson Company, Inc.

PARENTS: R.A. Hanson Company, Inc. is a privately held corporation. No corporation owns 5% or more of Appellant.

R.A. Hanson Company has no subsidiaries or affiliates.

APPELLANT: RAHCO, Inc.

PARENT: R.A. Hanson Company, Inc.

RAHCO, Inc. has no subsidiaries or affiliates.

APPELLANT: Rainier Brewing Co.

PARENT: G. Heileman Brewing Company, Inc.

Rainier Brewing Co. has no subsidiaries or affiliates. Appellant merged into parent 12/31/83.

APPELLANT: Reynolds Metals Company

PARENTS: Reynolds Metals Company stock is publicly traded on the New York Stock Exchange. The only corporations owning 5% or more of Appellant are:

Templeton, Galbraith &
Hausberger, Ltd.
Windsor Fund Series/
Windsor Fund
Wellington Management Co./
Thorndyke, Doran, Paine
& Lewis

SUBSIDIARIES: Alpart Farms (Jamaica), Ltd.
Alpart Jamaica, Inc.
Alternwerder Hutten-Und
Walzwerk G.m.b.H.
Eskimo Pie Corporation

Halco (Mining), Inc.
Volta Aluminium Company
Limited

AFFILIATES:

Aluminio Del Caroni, S.A.
Aluminio Reynolds Del Peru
Sociedad Anonima
Aluminio Reynolds, S.A.
Aluminio Reynolds, Santo
Domingo, S.A.
Aluminium-Oxid-Gemeinschaft
Stade
Aluminium Oxid Stade G.m.b.H.
Aluminum Corporation of the
Philippines
Bevco Containers
Bushnell Plaza Development
Corporation
City Venture Corporation
Compania Metallurgica
Colombiana, S.A.
Compagnie Des Bauxites De
Guinee
Egyptian Aluminium Products
Company
Eskimo Europ, S.a.r.l.
Hamburger, Aluminium-Werk
G.m.b.H.
Industria Navarra Del Aluminio,
S.A.
Industrias Lacteas Del Yocomia,
S.A.
Industrias Metal Mecanicas
Del Quindio, S.A.
Iranian Aluminum Co.
Jamaica Alumina Security
Company, Ltd.
Lynx-Canada Explorations
Limited

Manicouagan Power Company
 Minas Do Dragao Ltda.
 Mineraco Rio Do Norte S.A.
 Mineraco Sao Jorge Ltda.
 Mineradora De Bauxita Ltda.
 Minerais De Aluminio Ltda.
 New Eastwick Corporation
 Phillips-C.B.A. Conductors
 Limited
 Presidential Development
 Corporation
 Presidential Plaza Corporation
 Puerto De Hierro, Sociedad
 Anonima
 Reynolds Aluminio, Sociedad
 Anonima
 Reynolds Aluminum Company of
 Canada, Ltd.
 Reynolds Philippine Corporation
 Reywest Development Corporation
 S.L.I.M.-Societa Lavorazioni
 Industriali Metalli S.p.A.
 Superenvases Envalic, C.A.
 Umco, S.A.
 Union Industrial y Astilleros
 Barranquilla "Unial" S.A.
 Valesul Aluminio S.A.
 Weybosset Hill Development
 Corporation
 Worsley Alumina Pty., Ltd.
 Alternative Housing Associates
 Alumina Partners of Jamaica
 Aluminium-Oxid-Gemeinschaft
 Stade
 Bennett Manor Associates
 Bevco Containers
 Burrstone Associates
 Capitol Hill Associates, Ltd.

Cathedral Square Associates
 Cathedral Square Associates, II
 Chasco Woods Associates, Ltd.
 Curtis Apartments Associates
 Cypress Courts Associates, Ltd.
 Cypress Cove Associates, Ltd.
 Drew Gardens Associates, Ltd.
 Midtown Associates
 Mill Pond Towers Associates
 The National Housing Partnership
 Oceanside Estates Associates, Ltd.
 One Empire Plaza Associates
 Rayburn Manor Associates
 Regency West Associates
 Reynolds Gilbane Realty
 Associates
 Reywest Development Company
 Southeast Vinyl Company
 Titusville Manor Associates
 Windermere Associates, Ltd.
 Eastwick Joint Venture I
 Eastwick Joint Venture IV
 Mount Gibson Joint Venture
 Regency Joint Venture
 The Reynolds-Gilbane-
 Weybosset Joint Venture
 Worsley Joint Venture
 Austria Dose G.m.b.H.
 Reynolds Aluminum
 Holdinggesellschaft m.b.H.
 Austria Dosen Gesellschaft m.b.H.
 & Co. K.G.
 1401 17th Street Associates
 Crown Oak Associates of Penfield
 Gerro Reynolds Dosenwerk
 G.m.b.H. & Co. K.G.
 Kimbrook Manor Associates, Ltd.
 LaSalle Square Associates
 RMC Holdings (Delaware), Inc.

APPELLANT: Scott Paper Company

PARENTS: None

SUBSIDIARIES: None

AFFILIATES: Gureola-Scott, S.A.
 Taiwan Scott Paper Corporation
 Celulosa Jujuy, S.A.
 Companhia de Papisis
 Scott Paper Limited
 Scott Paper Company de
 Costa Rica
 Sanyo Scott Company, Limited
 Ssangyong Paper Co., Ltd.
 Companhia Industrial de San
 Cristobal
 Scott Trading Limited
 Thai-Scott Paper Company
 Limited
 Brunswick Pulp & Paper
 Company
 Brunswick Pulp Land Company
 Canso Chemicals Limited
 Mountain Tree Farm Company

APPELLANT: Shulton, Inc.

PARENT: American Cyanamid Company

Shulton, Inc. has no subsidiaries or affiliates.

APPELLANT: Spacelabs, Inc.

PARENT: Squibb Corporation

SUBSIDIARIES: None

AFFILIATES: Bach Mueller Company
 California Public Screening Inc.
 Charles of the Ritz S.A.
 International Biomedics, Inc.

Manufactureros Quimicos
 Farmaceuticos S.A.
 Ohmaco S.A.
 Sino American Shanghai
 Standard Pharmaceuticals Ltd.
 Squibb Nova Ltd.
 Squibb Connaught
 Squibb Industria Quimica, S.A.
 Squibb Pakistan Ltd.
 Squibb (Nigeria) Ltd.
 Squibb of Bangladesh Ltd.
 Symbotics Ltd.
 Von Heyden Gesellschaft Mit
 Beschränkter Haftung

APPELLANT:

Square D Company

PARENT:

Square D Company stock is publicly traded on the New York Stock Exchange. Only one entity owns more than 5% of Appellant:

Delaware Management Company, Inc.

SUBSIDIARIES:

Palatine Hills Leasing, Inc.
 Square D Andina, S.A.
 Square D (Saudi Arabia) Limited

AFFILIATES:

Furukawa Circuit Foil Co., LTD
 Square D France, S.A.
 Square D Company Australia
 PTY, Limited
 Square D Italia S.p.A.
 Daito Topaz

APPELLANT:

Thomasville Furniture Industries, Inc.

PARENT:

Armstrong World Industries, Inc.

SUBSIDIARIES:

None

- AFFILIATES: Inarco Limited
Armstrong Cork (Ireland)
Limited
Armstrong World Industries,
G.m.b.H.
Armstrong Cork Espana, S.A.
Armstrong World Industries Pty.
Ltd.
- APPELLANT: Trident Seafoods Corporation
- PARENTS: Trident Seafoods Corporation is a
privately held corporation. No
corporation owns 5% or more of
Appellant.
- SUBSIDIARY: San Juan Seafoods, Inc.
- AFFILIATE: Windjammers, Inc.
- APPELLANT: Uncle Ben's Inc.
- PARENT: Mars, Incorporated
- Uncle Ben's, Inc. has no subsidiaries or affiliates.
- APPELLANT: U.S. Oil & Refining Co.
- PARENT: Time Oil Co.
- SUBSIDIARY: Diox Oil Inc.
- AFFILIATES: None
- APPELLANT: Welch Foods, Inc., a cooperative
- PARENT: National Grape Cooperative
Association, Inc.
- SUBSIDIARIES: The Springfield Bank for Cooper-
atives Cooperating Brands, Inc.
- AFFILIATES: None

APPELLANT: Western Steel Casting Company
 PARENTS: Western Steel Casting Company is
 a privately held company.

Appellant has no subsidiaries or affiliates.

APPELLANT: Westinghouse Electric Corporation

PARENTS: Westinghouse Electric Corporation
 stock is traded on the New York
 Stock Exchange. No corporation
 owns 5% or more of Appellant.

SUBSIDIARIES: Electric Office Centers of America
 Innovative Technologies, Inc.
 KRW Energy Systems, Inc. -
 Mictron, Inc.
 Powerex, Inc.
 Sentec Corporation
 Siliconix, Inc.
 Speech Plus
 Theta J Corporation
 Toshiba-Westinghouse Electronics
 Corporation
 Turbine Metal Technologies, Inc.
 United Western Technologies
 VLSI Technology
 WM Power Products, Inc.
 Compagnie des Dispositifs
 Semiconducteurs Westinghouse
 Eletromar Industria Eletrica
 Brasileira, S.A.
 Enwesa Servicios S.A.
 Tyree Industries Limited
 Vektron, S.A.
 Westinghouse Canada Inc.
 Westinghouse, S.A.
 WEXICO Systems and Services,
 Ltd.

AFFILIATES:

Boo Instrument AB
 CDSW Ireland Limited
 CEMAC Westinghouse PTY
 Limited
 Condumex
 Consu-IEM, S.A. de C.V.
 Contradores Electricos, C.A.
 Division Comercial IEM, S.A.
 de C.V.
 Electro-Fanal S.A.
 Eletromar Nordeste, S.A.
 Electrotableros, S.A. de C.V.
 E-Mail Westinghouse PTY Ltd.
 Empresas IEM, S.A. de C. V.

APPELLANT:

W.R. Grace & Co.

PARENTS:

W.R. Grace & Co. stock is publicly
 traded on the New York Stock
 Exchange. No corporation owns
 5% or more of Appellant.

SUBSIDIARIES:

AWI
 Business Data Services, Inc.
 Carbon Dioxide Slurry Systems
 L.P.
 CFF Beverage Company
 Del Taco Corporation
 Duke Transportation Inc.
 El Torito Restaurants, Inc.
 EMABond Inc.
 E.T. Beverage Company, Inc.
 GHL Management, Inc.
 Grace Ventures Partnership One
 Herman's Sporting Goods, Inc.
 J.T. Beverage Inc.
 The L.C.S. Beverage Company,
 Inc.
 Monolith Enterprises, Incorporated

Mountain View Insurance
 Company
 S&H Beverage Co., Inc.
 Soft Kat, Inc.
 Taco Villa, Inc.
 T&D Beverage, Inc.
 TAG Pharmaceuticals, Inc.
 Producta de Papeles S.A.
 Feldmuehle-Grace Noxeram
 G.m.b.H.
 Darex Kabushiki Kaisha
 Fuji-Davison Chemical Ltd.
 Nippon Belt Kogyo K.K.
 Teroson K.K.
 Homco Trinidad Ltd.
 Trinidad Nitrogen Co., Limited
 Bartow Chemical Products

AFFILIATES:

Agracetus
 Axial Basin Ranch Company
 Beckett Partners
 Bison Nitrogen Products Co.
 Colowyo Coal Company
 Four Corners Mine
 Ft. Meade Chemical Products
 Grace-Feldmuehle Motor Ceramics
 Company
 Hayden Gulch West Coal
 Company
 H-G Coal Company
 Hughes Drilling Fluids
 Marine Culture Enterprises
 Oklahoma Nitrogen Co.
 Paramount Coal Company
 Pursue Gas Processing and
 Petrochemical Company
 The Fono Ice Cream Company
 Equipos IEM, S.A. de C.V.

Friem, S.A. de C.V.
 Funktionelle Musik G.m.b.H.
 Futu-IEM, S.A. de C.V.
 Galileo La Rioja, S.A.
 Galileo Uruguay, S.A.
 Hyundai Elevator
 IEM S.A.
 Industrias Electronicas, S.A.
 Industria IEM, S.A. de C.V.
 Industry Services Company of
 Saudi Arabia, Ltd.
 Korea Industry Services
 Company, Ltd.
 Maihak A.G. (H.)
 Mex-Control, S.A. de C.V.
 Mitsubishi Nuclear Fuel Co., Ltd.
 Mitsubishi-Westinghouse Electric
 SGC, Ltd.
 Reftrans, S.A.
 Servicios Corporativos, IEM, S.C.
 Silectra, S.A. de C.V.
 Transformadores de Distribucion,
 S.A.
 Transformadores TPL S.A.
 Tyree-Power Construction Limited
 Wescan Europe, Ltd.
 Westinghouse Asia Controls Corp.
 Westinghouse Electric Supply Co.
 of Saudi Arabia
 Westinghouse Electro
 Metalurgicas, C.A.
 Westinghouse Proyectos Electricos,
 S.A.
 Westinghouse Saudi Arabia, Ltd.
 Westralian Transformers PTY
 Limited
 Avatar Technologies Control

Bridgeport Community Antenna
TV Co.
Cable TV General, Inc.
CATV Enterprises, Inc.
American Health Capital HIBI
Management, Inc.
Cordell Chemicals, Inc.
El Paso Cablevision, Inc.
Focus Cable of Oakland, Inc.
Grosse Point Cable, Inc.
Group W Cable of Columbia
Heights/Hilltop, Inc.
Group W Cable of Lorain County,
Inc.
Group W Cable of North Central
Chicago, Inc.
Group W of Northwest Chicago,
Inc.
Group W Cable of St. Bernard,
Inc.
Horizon International Television,
Inc.
Integrated Communications
Systems
Kaiser-Teleprompter of Hawaii,
Inc.
New Trends, Inc.
Northern Tier Pipeline
O'Connor Combustor Corporation
Perceptics
Piedmont Cablevision, Inc.
Porta Pak Corporation
Saw Mill River Cablevision, Inc.
Sifco Turbine Component Services
Southwest Video Corporation
Sutro Towers, Inc.
Telecom Cablevision, Inc.
Television Tower, Inc.
Valid Logic Systems, Inc.

APPELLANT: Xerox Corporation

PARENTS: Xerox Corporation stock is publicly traded on the New York Stock Exchange. No corporation owns 5% or more of Appellant.

SUBSIDIARIES: Xerox Canada Inc.
 Xerox do Brasil S.A.
 Xerox del Peru, S.A.
 Xerox de Venezuela, C.A.
 Xerox de Colombia S.A.
 Rank Xerox Investments Limited
 Rank Xerox Limited
 Rank Xerox Holding B.V.

AFFILIATES: Societe Industrielle Rank
 Xerox S.A.
 Fuji Xerox Co., Ltd.
 Rank Xerox (Australia) Pty.
 Limited
 Rank Xerox Greece S.A.
 International Marine Underwriters of New England, Inc.
 LWB Syndicate Inc.
 CALPAC Holding Company, Inc.
 Claremont Holdings Limited
 Commonwealth County Mutual Insurance Company
 Commonwealth Lloyd's Insurance Company
 Financial Guaranty Associates, Inc.
 Dimensional Corporate Finance, Inc.

APPENDIX F

[SEAL]

STATE OF WASHINGTON

DEPARTMENT OF REVENUE

Olympia, Washington 98504 MS-AX-02

DATE: June 14, 1984

TO: The Honorable John Spellman
Governor

FROM: Donald R. Burrows, Director /s/ DB
Department of Revenue

RE: Potential Tax Loss to the State of Washington
Resulting from U.S. Supreme Court Decision
on West Virginia Business and Occupation Tax
(*Armco, Inc. v. Hardesty*, No. 83-297, decided
June 12, 1984)

We are faced with the potential for a substantial loss of tax revenue as a result of a U.S. Supreme Court decision handed down this week involving the Armco Corporation. That company had challenged the application of West Virginia's business and occupation tax to out-of-state manufacturers, selling certain products into the state. I noted this case in my March 1984 activities report. Washington filed an amicus curiae brief with the U.S. Supreme Court in support of West Virginia.

According to our senior attorneys general, we will in all likelihood sooner or later have to refund business and occupation taxes to out-of-state manufacturers. These refunds will cover taxes paid in the current and four prior years. Our attorneys also advise me that in-state manufacturers might have grounds for similar relief from B&O tax based upon the wording of the *Armco* de-

cision. This latter possibility is not so imminent, and there is greater likelihood that those impacts can be mitigated either in the legislature or the courts.

We have for many years taxed out-of-state manufacturers selling into our state provided there has been sufficient local activity. The landmark decisions of the U.S. Supreme Court in *General Motors* (1964) and *Standard Pressed Steel* (1975) uphold that authority.

In the *Armco* decision, the Supreme Court found that West Virginia's statute discriminated against out-of-state manufacturers in violation of the Commerce Clause because it imposed the wholesaling tax on out-of-state manufacturers, while exempting local manufacturers (liable for the manufacturing B&O tax) from the same wholesaling tax. Our own statute (RCW 82.04.440) exempts in-state manufacturers from the B&O tax on manufacturing, if they wholesale their merchandise in Washington, provided these firms pay the B&O tax as wholesalers on their in-state sales.¹ Out-of-state manufacturers are subject to wholesaling B&O tax in this state. Our law provides no credit against that tax for a manufacturing gross receipts tax for which that out-of-state seller might be liable to the state of manufacture. In the opinion of our attorneys the reasoning of the Court in the *Armco* decision is clearly applicable to our statutory arrangement, thus setting up the distinct prospect of a substantial revenue loss. A memorandum from the Department's attorneys analyzing the decision in greater detail is included here.

The potential revenue loss is comprised of (1) refunds of B&O taxes paid between January 1, 1980 and July 1, 1984, (2) future revenue loss for the remainder of this

¹ Out-of-state sales of Washington manufacturers are constitutionally exempt from wholesaling B&O tax. We can and do tax them on their manufacturing activities.

biennium, and (3) revenue loss for the 85-87 biennium. We are now working intensively to develop a reliable estimate of the revenue loss and this will be forwarded to you as soon as we have it.

The attached memorandum from our counsel discusses possible legislative changes to preserve the B&O tax on out-of-state manufacturers. Two are being given immediate consideration. The safest, legally, for purposes of insuring a continued wholesaling (or retailing) tax on the out-of-state manufacturer would be the more difficult change to enact. The change would remove the exemption from the manufacturers B&O tax for those in-state manufacturers selling within the state. Thus, integrated manufacturers would pay both the manufacturing and wholesaling tax. This doubling-up was in fact the manner in which the business and occupation tax was previously applied to an integrated manufacturer until the manufacturers exemption now found in RCW 82.04.440 was put into place many years ago. We can expect strong opposition from in-state manufacturers to this proposal for legislative change.

The second alternative currently under exploration would provide to the out-of-state manufacturer, selling into Washington, a credit against its obligation for wholesaling or retailing business and occupation tax by reason of a manufacturing business and occupation or similar gross receipts tax paid to another state in which the manufacturing took place. This would result in the loss of some revenue, but there are currently few states which have such manufacturing gross receipts taxes. While a challenge would undoubtedly be made to such an amendment, our attorneys are reasonably confident that the amendment could be sustained.

We are continuing to work on these revenue loss estimates. In the meantime, I or the members of my staff

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are available to provide your office with a more detailed briefing.

P.S.

The legal analysis from our AG's and court decision will be sent over this PM

cc: Rolland Schmitten
Ken Gross
Joe Taller
Matthew J. Coyle
Leland T. Johnson

